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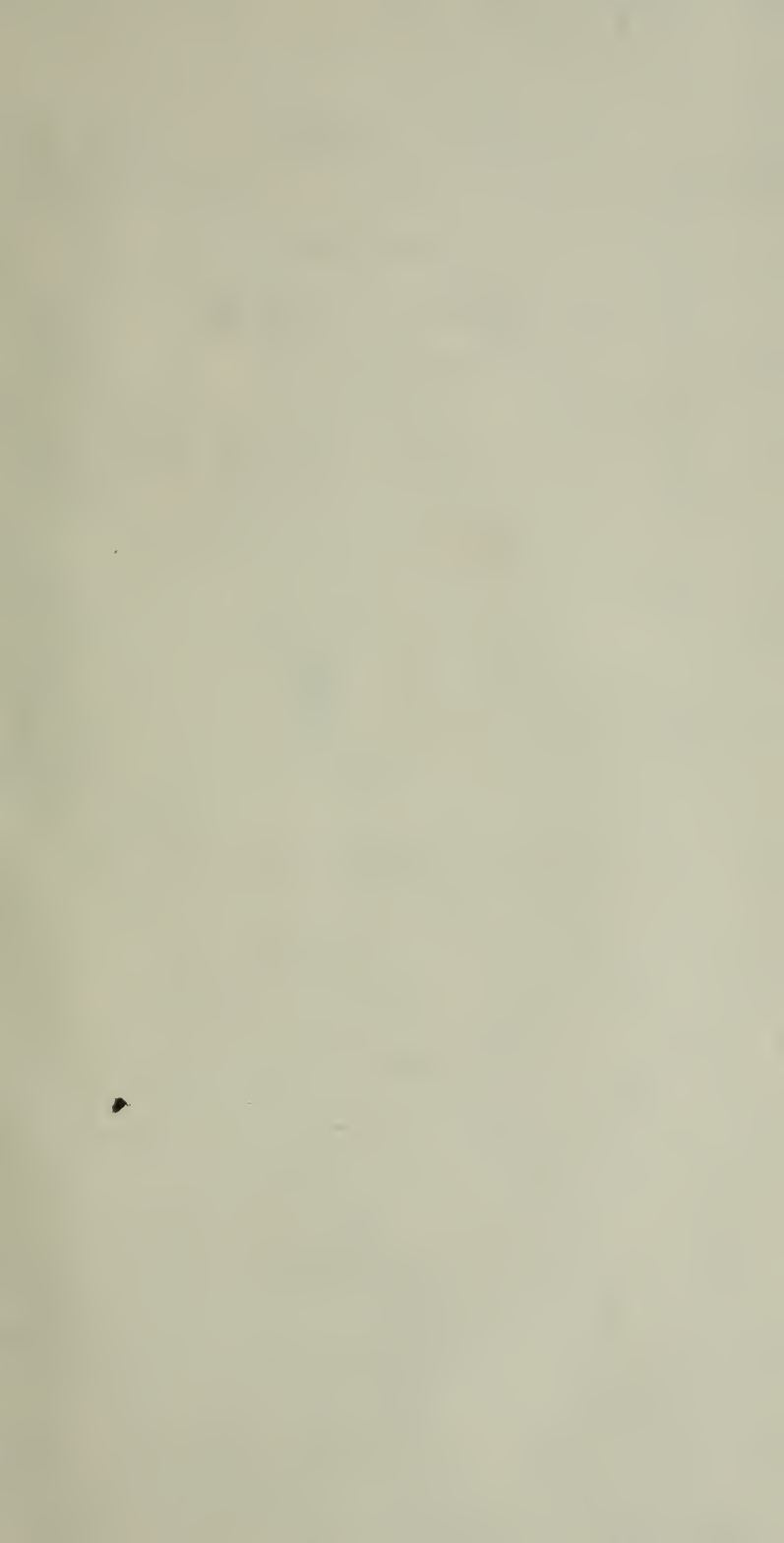
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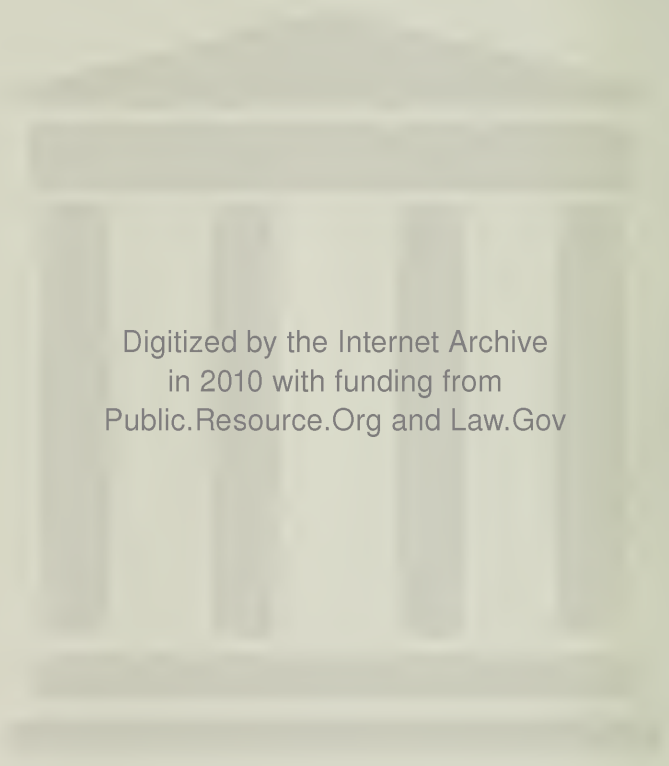
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N. 302³ No. 15412

United States
Court of Appeals
For the Ninth Circuit

UNDERWRITERS AT LLOYD'S, LONDON,
ENGLAND,

Appellant,

vs.

JANE S. LYONS,

Appellee.

Transcript of Record
In Three Volumes

Volume I
(Pages 1 to 38)

Appeal from the United States District Court for the
District of Oregon

FILED

MAR 21 1957

PAUL P. O'BRIEN, CLERK

No. 15412

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Portland 5, Oregon,

For Appellee.

The United States District Court for the
District of Oregon

Civil No. 7256

JANE S. LYONS,

Plaintiff,

vs.

UNDERWRITERS AT LLOYD'S, LONDON,
ENGLAND,

Defendant.

COMPLAINT

Plaintiff complains and alleges as follows:

First Claim

I.

Plaintiff is a citizen and inhabitant of the State of Oregon.

II.

Defendant is an association of individuals engaged in the insurance business and each member of said association is a citizen of the United Kingdom and none of them are citizens or residents of the State of Oregon.

III.

The amount in controversy herein exceeds \$3,000, exclusive of interest and costs.

IV.

Prior to February 10, 1953, defendant for a good, sufficient and valuable consideration, issued to

James A. Lyons a certificate and policy of insurance under the terms of which defendant promised and agreed that in case said James A. Lyons sustained bodily injury resulting in death caused solely and independently of any other cause by external, violent, accidental and visible means it would pay to plaintiff, as beneficiary under said policy, the sum of \$75,000.00.

V.

Said policy and certificate of insurance was in full force and effect at all times mentioned in this complaint.

VI.

On or about February 10, 1953, said James A. Lyons suffered fatal injuries by reason of the accidental discharge of a firearm and his death thereby resulted from and was caused by external, violent, accidental and visible means.

VII.

Plaintiff has performed each and every condition precedent upon her part to be kept and performed and has made claim to defendant for the said sum of \$75,000.00, but defendant has denied all liability under said policy and certificate of insurance and has failed and refused to pay said sum or any part thereof, and the said sum, together with interest thereon at the rate of 6% per annum from February 10, 1953, is due and owing from defendant to plaintiff.

VIII.

More than six months have elapsed since plain-

tiff made claim to defendant and \$15,000.00 is a reasonable sum to be allowed plaintiff as attorneys' fees in the prosecution of this, her First Claim.

Second Claim

I.

Plaintiff realleges, and by this reference incorporates herein, Paragraphs I, II and III of her First Claim.

II.

Prior to February 10, 1953, defendant for a good, sufficient and valuable consideration, issued to James A. Lyons a certificate and policy of insurance under the terms of which defendant promised and agreed that in case said James A. Lyons sustained bodily injury resulting in death caused solely and independently of any other cause by external, violent, accidental and visible means it would pay to plaintiff, as beneficiary under said policy, the sum of \$25,000.00.

III.

Said policy and certificate of insurance was in full force and effect at all times mentioned in this complaint.

IV.

On or about February 10, 1953, said James A. Lyons suffered fatal injuries by reason of the accidental discharge of a firearm and his death thereby resulted from and was caused by external, violent, accidental and visible means.

V.

Plaintiff has performed each and every condition precedent upon her part to be kept and performed and has made claim to defendant for the said sum of \$25,000.00, but defendant has denied all liability under said policy and certificate of insurance and has failed and refused to pay said sum or any part thereof, and the said sum, together with interest thereon at the rate of 6% per annum from February 10, 1953, is due and owing from defendant to plaintiff.

VI.

More than six months have elapsed since plaintiff made claim to defendant and \$5,000.00 is a reasonable sum to be allowed plaintiff as attorneys' fees in the prosecution of this, her Second Claim.

Wherefore, plaintiff on her First Claim demands judgment in the sum of \$75,000.000, with interest thereon at 6% per annum from February 10, 1953, until paid, together with her costs and the further sum of \$15,000.00, attorneys' fees; and, on her Second Claim, plaintiff demands judgment in the sum of \$25,000.00, together with interest thereon at 6% per annum from February 10, 1953, together with her costs and the sum of \$5,000.00, attorneys' fees.

/s/ ROBERT F. MAGUIRE,

/s/ HOWARD K. BEEBE,

Attorneys for Plaintiff.

[Endorsed]: Filed November 13, 1953.

[Title of District Court and Cause.]

Civil No. 7256

ANSWER

Comes now defendant and for answer to plaintiff's complaint, on file herein, admits, denies and alleges as follows:

First Defense

I.

Admits Paragraphs I, II and III of plaintiff's First Claim and Paragraph I of plaintiff's Second Claim.

II.

Denies each and every other allegation of plaintiff's First and Second Claims, and the whole thereof, generally and specifically, except as may be hereinafter admitted.

Second Defense

I.

Defendant alleges that prior to and on or about the 10th day of February, 1953, there was in full force and effect Lloyds Accident Policy, certificate number 0-5058-1, in the principal sum of \$25,000.00, and Lloyds Accident Policy, certificate number O-OMC-1740, in the principal sum of \$75,000.00, wherein James Alexander Lyons was the named assured and Jane Lyons, the designated beneficiary.

II.

That under and by virtue of the terms and pro-

visions of said policies, hereinbefore described, the principal sum became payable in the event the assured, James Alexander Lyons, sustained bodily injury caused by accidental, violent, external and visible means, which solely and independently of any other cause, within three calendar months from the date of the accident causing such injury, occasioned his death, and said policies specifically excluded death directly or indirectly caused or contributed to by disease or natural causes.

III.

That under and by virtue of the terms and provisions of said policies, as a condition to the payment of said principal sum, the claim therefore was required to be substantiated by the submission to defendant of satisfactory proof of death within the policy provisions and without the policy exclusions.

IV.

That plaintiff failed to submit to defendant satisfactory proof:

(a) That the assured sustained bodily injury caused by violent, external and visible means, which solely and independently of any other cause within three calendar months from the date of the accident causing such injury occasioned his death, and

(b) That the assured's death was not directly or indirectly caused or contributed to by disease or natural causes;

and defendant thereupon rejected plaintiff's claim.

Third Defense

I.

Defendant realleges Paragraphs I and II of its Second Defense.

II.

Defendant alleges that if the assured, James Alexander Lyons, sustained any bodily injury prior to his demise, that:

(a) Said injuries did not solely and independently of any other cause occasion his death.

(b) The assured James Alexander Lyons' death was directly or indirectly caused or contributed to by disease or natural causes.

Wherefore, defendant demands judgment that the complaint herein be dismissed and that it have its costs and disbursements of this action.

MEINDL, MIZE & KRIESIEN,

By /s/ R. E. KRIESIEN,

Of Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed December 4, 1953.

[Title of District Court and Cause.]

Civil No. 7256

PRETRIAL ORDER

On the 12th day of September, 1955, a pretrial conference in the above-entitled action was held in

open court, before the Honorable William G. East, Judge of the above-entitled court; plaintiff was represented by Robert F. Maguire and Howard K. Beebe, of her attorneys, and defendant was represented by R. E. Kriesien and Ray Mize, of its attorneys.

Thereupon the following proceedings were had:

Agreed Statement of Facts

I.

That diversity of citizenship exists between the parties in that plaintiff is a citizen and resident of the State of Oregon and defendant is an association of individuals engaged in the insurance business, each member thereof being a non-resident of the State of Oregon.

II.

That the amount in controversy herein exceeds \$3,000.00, exclusive of interest and costs.

III.

That prior to the 10th day of February, 1953, Lloyds Accident Policy certificate number O-5058-1, in the principal sum of \$25,000.00, and Lloyds Accident Policy, certificate number O-OMC-1740, in the principal sum of \$75,000.00 were issued in the State of Oregon, wherein James Alexander Lyons was the named assured, and the plaintiff Jane Lyons, the designated beneficiary, said policies being in full force and effect on the 10th day of February, 1953, said policies being renewals of identical policies in force and effect from July 8, 1948.

IV.

That under and by virtue of the terms and provisions of said policies, Plaintiff's Exhibits 1 and 2, the principal sum became payable to the plaintiff in the event the assured James Alexander Lyons:

(a) Sustained bodily injury caused by accidental, violent, external and visible means, which shall solely and independently of any other cause within three calendar months from the date of the accident causing such injury occasion his death; and

(b) That the assured's death was not directly or indirectly caused or contributed to by disease or natural causes.

V.

That on or about the 10th day of February, 1953, the assured, James Alexander Lyons, died in the country called Los Lanos, Southern Territory of Lower California, Mexico.

VI.

That thereafter an inquest was held and an autopsy performed inquiring into the cause of the death of the assured, James Alexander Lyons, certified copy of which in Spanish is Exhibit 5 and the English translation thereof is Exhibit 5A, and the other certified copies in the Spanish is Exhibit 27 and the English translation thereof is Exhibit 27A.

VII.

That there was duly recorded in the Book of Deaths for the year 1953, Number One of the Civil

Registry in the Port of San Jose del Cabo, Southern Territory of Lower California, Mexico, at pages 3, 4 and 5, as Act Number 5, death certificate which certified that the cause of death of James Alexander Lyons was:

“That the cause of death was owed to an aortical insufficiency that probably provoked the sudden fatigue of the heart having found moreover atheromatous deposits of the coronary arteries.”

A certified copy of the original in Spanish is Exhibit 4 and the English translation thereof is Exhibit 4A.

VIII.

That plaintiff filed proof of death of James Alexander Lyons with defendant. Plaintiff's Exhibit 3.

IX.

That defendant rejected plaintiff's claim and more than six months elapsed thereafter before plaintiff instituted this action.

Plaintiff's Contentions

1. Said James Alexander Lyons died of bodily injury caused by accidental, violent, external and visible means which solely and independently of any other cause occasioned his said death.

2. Said death was not directly caused or contributed to by disease or natural causes.

3. Plaintiff is entitled to recover from defendant the sum of the face amount of said policies, to-

gether with interest thereon at 6% per annum from February 10, 1953, until paid, and, in addition, the sum of \$20,000.00 as and for a reasonable attorneys' fee herein.

Defendant's Contentions

1. That on or about the 20th day of May, 1950, the assured, James Alexander Lyons, suffered an attack of coronary insufficiency.

2. That on the 3rd, 4th and 5th days of February, 1953, the assured, James Alexander Lyons, had a pre-existing heart disease which resulted in an attack of coronary insufficiency to the extent that nitroglycerin was prescribed and the assured, James Alexander Lyons, was advised to refrain from doing any strenuous exercise such as lifting or tramping through the fields.

3. That on the 10th day of February, 1953, the assured, James Alexander Lyons, had a pre-existing heart disease.

4. That the assured, James Alexander Lyons, died as a result of a fatal heart attack due to the diseased condition of his heart and not as a result of an accidental injury and therefor is not entitled to recover under the terms and provisions of the policies of insurance involved herein.

5. That it is more, or as equally, probable the shotgun was discharged as a result of the assured, James Alexander Lyons, suffering a fatal heart attack as it is that the shotgun was accidentally discharged prior to the fatal heart attack.

6. That the proof of death submitted by plaintiff to defendant constituted an admission that a pre-existing heart disease caused or contributed with the injury, if any, in resulting in the death of the assured, James Alexander Lyons, and under the law as enunciated by the Supreme Court of the State of Oregon, such accident, if any, cannot be considered as the sole cause or the cause independent of all other causes of death.

7. That if it is established by competent, satisfactory evidence the shotgun was accidentally discharged prior to the fatal heart attack, the superficial injuries sustained by the assured, James Alexander Lyons, and the resulting emotional shock, if any, would not have caused an aortic insufficiency or a coronary insufficiency without the existence of the pre-existing heart disease and that it was necessary for the pre-existing heart disease to co-operate with the injury, if any, to result in the death of the assured and under such set of facts under the law of the State of Oregon such death was not an accidental death within the policy coverage.

8. That plaintiff failed to submit satisfactory proof the assured, James Alexander Lyons, accidentally discharged a shotgun prior to suffering a fatal heart attack.

9. That plaintiff failed to submit satisfactory proof that the injuries sustained by the assured, James Alexander Lyons,

(a) Solely and independently of any other cause occasioned his death, and

(b) That the assured's death was not directly or indirectly caused or contributed to by the pre-existing heart disease.

10. That in the event plaintiff should prevail, plaintiff is not entitled to attorney's fees.

Issues of Fact

1. Is there any competent, satisfactory evidence that a shotgun was accidentally discharged which inflicted bodily injuries prior to the assured, James Alexander Lyons, suffering a fatal heart attack?

2. Did any bodily injuries sustained by the assured, James Alexander Lyons, solely and independently of all other causes result in his death?

3. Did the assured, James Alexander Lyons, have a pre-existing heart disease?

4. Was the death of the assured, James Alexander Lyons, caused or contributed to by a pre-existing heart disease?

5. Was a diseased heart condition of the assured, James Alexander Lyons, the sole cause of his death?

6. In the event plaintiff is entitled to recover, was the proof of death filed with defendant sufficient proof of accidental death under the policy so as to entitle plaintiff to recover attorney's fees as a result of defendant's denial of such claim and,

if so, what sum would be a reasonable sum to allow plaintiff as attorney's fees herein?

Exhibits

The following exhibits have been displayed by the parties, respectively, and are below enumerated and identified, the parties agreeing with the approval of the court that no further identification of exhibits is necessary. The parties admit the authenticity of the following exhibits, but reserve the right to object to their introduction into evidence on the grounds of irrelevancy, immateriality and incompetency.

Plaintiff's Exhibits

1. Policy No. 0-5058-1.
2. Policy No. O-OMC-1740.
3. Proof of Death.
4. Certified copy of death certificate.
- 4(a). Translation of Death Certificate.
5. Certified copy of Inquest.
- 5(a). Translation of Inquest.
6. Doctor's certificate of February 21, 1953.
- 6(a). Translation of doctor's certificate of February 21, 1953.
7. Shotgun.
8. Roll of film.
9. Deposition of Dr. Rush.
10. Deposition of Dr. McBride.
11. Notes of Dr. Lehman.
12. Letter from Maguire, et al., to Pacific Insurance Adjusters February 26, 1953.

13. Cable Maguire, et al., to Heath February 16, 1953.

13(a). Wire Maguire, et al., to D. K. MacDonald February 16, 1953.

14. Cable Heath to Maguire, et al., February 19, 1953.

15. Letter Pacific Insurance Adjusters to Maguire, et al., February 17, 1953.

16. Letter Pacific Insurance Adjusters to Maguire, et al., February 20, 1953.

17. Letter Pacific Insurance Adjusters to Maguire, et al., April 7, 1953.

18. Letter Maguire, et al., to Pacific Insurance Adjusters July 17, 1953.

19. Letter Maguire, et al., to Pacific Insurance Adjusters September 15, 1953.

20. Letter R. E. Kriesien to Maguire October 30, 1953.

21. Chart, "Your Heart and How It Works."

22. Chart of heart.

23. Illustrative chart.

24.

25.

26.

Defendant's Exhibits

27. Certified copy of Inquest.

27(a). Translation of Inquest.

28. Certified copy of Supplemental Statement.

28(a). Translation of Supplemental Statement.

29. Dr. McBride's medical case history file.

30.

31.

32.

33.

34.

35.

The parties and each of them reserve the right to adopt any or all of the above pretrial exhibits.

The foregoing is certified to be a record of the proceedings had at the pretrial hearing in this court, and it is

Ordered that the issues to be tried herein shall be those herein set forth as issues of law and fact;

It Is Further Ordered that the pretrial conference in this case having been held and participated in by all parties, the pleadings now pass out of the case and the foregoing pretrial order shall control the subsequent course of the trial and shall not be hereafter amended except by consent of the parties or by order of the court to prevent manifest injustices.

Done and dated in open court this 28th day of November, 1955.

/s/ EDWARD P. MURPHY,
United States District Judge.

/s/ HOWARD K. BEEBE,
Of Attorneys for Plaintiff.

/s/ R. E. KRIESIEN,
Of Attorneys for Defendant.

[Endorsed]: Filed November 28, 1955.

[Title of District Court and Cause.]

Civil No. 7256

MEMORANDUM OPINION

These are two actions by the beneficiary of two accident policies issued to James A. Lyons. The insured died on February 10, 1953, near Los Llanos, Lower California, Republic of Mexico, while on a hunting trip with a small party, including two well-qualified cardiologists, Drs. Rush and Chamberlain. The issue for resolution is whether or not the insured died by reason of bodily injury caused by accidental, violent, external and visible means, and whether that injury solely and independently of any other cause within three calendar months from the date of the accident occasioned the death. As a corollary to this issue, or as a further condition, plaintiff had the burden of proving that the assured's death was not directly or indirectly caused or contributed to, within the meaning of the contract, by disease or natural causes.

The trial consumed a considerable number of days. Six eminent heart specialists, and several other highly qualified medical specialists testified at great length. The court having been placed in the uninviting position of testing the sharply conflicting conclusions of the medical experts with respect to the manner of occurrence of the death, it has reviewed the testimony and the record, and has been convinced by a preponderance of the evi-

dence that the assured at the time of his death was a vigorous, robust man of normal health for his age; that the condition of his heart and arteries, while less than perfect when measured by a standard of perfection, was "normal" and "healthy" and not diseased within the meaning of those words for purposes of the policies in question; that on February 10, 1953, an accidental discharge of assured's shotgun resulted in injury to the assured to the extent of powder burns and at least one gunshot pellet being propelled into his face; that as a consequence of these bodily injuries a shock reaction commenced in the assured which terminated with heart failure; that although a heart which was perfect when measured on an absolute standard would have withstood the pain and shock of the injuries received by the assured, many hearts which are considered in view of the age and general condition of their possessors normal and robust, and not diseased within the meaning of the policies in question, might have succumbed to injuries and shock such as those received by the assured; that the assured in fact succumbed by reason of the injuries and resultant shock he accidentally sustained; and that the plaintiff has sustained his burden of proof on all matters before the court.

The wealth of evidence in this case is too great to permit of extended discussion. It may be noted briefly, however, that the autopsy report upon which defendants place reliance does not note the vital fact of the degree of diminishment of the aortic

lumen; that a diminishment in small part of the lumen, although noticeable, and properly noted by an autopsy surgeon, is nevertheless consistent with a properly functioning aorta; that in the absence of a detailed finding of the degree of diminishment of the lumen, the effect of such diminishment is left to speculation and surmise; that many men of the age group of the assured have some degree of diminishment of the aortic lumen without being diseased within the meaning of the policies; that the presence of atheromatous plaques on the aortic valves likewise is an insufficient notation upon which to found a conclusion of incompetence of the valves without some greater description of the degree of stiffness, warpedness, shrinkage, or other malfunction of the valves; that the autopsy report leaves the degree, if any, of malfunctioning of the valves a matter of speculation, for lack of a sufficient description of the degree, character, and effect of the atheromatous plaques discovered on the assured's aortic valves. Likewise, it may be noted briefly that defendant's expert witnesses did not have the same opportunity to observe the assured at close range and for a period of more than a day while he was engaged in strenuous activity and exertion, as did plaintiff's expert witnesses. The conclusions of defendant's expert witnesses that heart failure came on suddenly on February 10th are inconsistent with the conclusions of plaintiff's expert witnesses who had observed the deceased during periods of peak exertion and strain, greater

than any undergone by the deceased immediately before his death, and who had not detected any signs in the deceased's appearance which would have alerted their trained senses. Defendant's experts' other hypothesis of death, that the heart failure was brought on by a sudden sharp pain caused by a passing of a gallstone through the cystic duct, is made too remote and speculative a possibility and too unlikely a sequence of facts by the overwhelming weight of the other expert testimony in this case.

These brief observations are made not to represent the complete or exclusive basis upon which the court has made its findings, but only to answer some of the main contentions made by the defendant, out of deference to the extreme skill with which they, as well as counsel for plaintiff, have presented their case. All counsel associated with these cases are to be commended upon the manner in which they prepared and presented them. Let the prevailing party prepare findings of fact and conclusions of law in accordance with the Rule, if it is so desired.

Dated: October 12th, 1956.

/s/ EDWARD P. MURPHY,

United States District Judge.

[Endorsed]: Filed October 16, 1956.

[Title of District Court and Cause.]

Civil No. 7256

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on regularly for trial before the undersigned judge of the above-entitled Court, the Court having heard the opening statements of counsel, the evidence adduced by both parties and having considered the same, together with all exhibits received in evidence herein and the briefs of counsel, and being of the opinion that the plaintiff has sustained her burden of proof on all matters involved herein, the Court does hereby make the following:

Findings of Fact

I.

Diversity of citizenship exists between the parties in that plaintiff is a citizen and resident of the state of Oregon and defendant is an association of individuals engaged in the insurance business, each member thereof being a nonresident of the state of Oregon.

II.

The amount in controversy herein exceeds \$3000, exclusive of interest and costs.

III.

Prior to the 10th day of February, 1953, defendants issued in the state of Oregon Lloyds accident

policy No. O-5058-1 in the amount of \$25,000, and Lloyds accident policy No. O-OMC-1740, in the amount of \$75,000. Under said policies James Alexander Lyons was the named insured and plaintiff herein was the designated beneficiary thereunder. Said policies were in full force and effect on the 10th day of February, 1953.

IV.

Under and by virtue of the terms and provisions of said policies, the principal sum thereunder became payable to plaintiff in the event the said James Alexander Lyons shall:

(a) Sustain bodily injury caused by accidental, violent, external and visible means which should solely and independently of any other cause within three calendar months from the date of the accident causing such injury occasion his death; and

(b) That such death be not directly or indirectly caused or contributed to by disease or natural causes.

V.

On or about the 10th day of February, 1953, the said James Alexander Lyons sustained bodily injury caused by accidental, violent, external and visible means which solely and independently of any other cause occasioned his death within three calendar months from the date of the accident which caused said injury. Said injury was caused by the accidental discharge of a shotgun.

VI.

Said James Alexander Lyons was a vigorous, robust man of normal health for his age and was not suffering from disease. His said death was not caused or contributed to directly or indirectly by disease or natural causes.

VII.

On or about October 14, 1953, plaintiff submitted due proof of said death to defendants and more than six months has elapsed since the submission of such proof. Defendant has failed and neglected to pay to plaintiff said principal sum or any part thereof.

Based upon said Findings, the Court hereby makes and draws the following:

Conclusions of Law

I.

Plaintiff is entitled to recover of and from the defendants the sum of \$100,000, together with interest thereon at the rate of 6% per annum from October 14, 1953, until paid.

II.

Under Oregon law plaintiff is entitled to recover of and from the defendant a reasonable attorney's fee to be later found and established by the Court and the Court does hereby reserve jurisdiction for the purpose of finding, fixing and awarding such attorney's fee.

III.

Plaintiff is entitled to recover her necessary costs and disbursements herein incurred.

Dated this 9th day of November, 1956.

/s/ EDWARD P. MURPHY,

United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1956.

[Title of District Court and Cause.]

SUPPLEMENTAL FINDINGS OF FACT

It having been stipulated by the parties hereto that the issue of the amount to be allowed to plaintiff on account of a reasonable attorney's fee herein be submitted to the court for determination upon the record, the court does hereby make the following

Supplemental Findings of Fact

I.

The sum of \$20,000.00 is a reasonable sum to be allowed plaintiff on account of attorney's fees herein.

Dated this 9th day of November, 1956.

/s/ EDWARD P. MURPHY,

United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1956.

The United States District Court
for the District of Oregon

Civil No. 7256

JANE S. LYONS,

Plaintiff,

vs.

UNDERWRITERS AT LLOYD'S, LONDON,
ENGLAND,

Defendant.

JUDGMENT ORDER

The above-entitled cause came on regularly for trial without a jury before the Honorable Edward P. Murphy, Judge of the above-entitled Court, commencing on November 22, 1955, and concluding December 8, 1955. Plaintiff appeared in person and by Robert F. Maguire and Howard K. Beebe of her attorneys, and defendant appeared by Ray Mize and R. E. Kriesien, their attorneys. The respective parties introduced evidence upon the issues raised by the Pretrial Order and their counsel argued the law and the facts by briefs. The Court having considered the evidence, arguments and briefs, and having made its Findings of Fact and Conclusions of Law, now, therefore,

It Hereby Is Considered, Ordered and Adjudged that plaintiff recover of and from the defendant the sum of \$100,000, together with interest thereon at the rate of 6% per annum from the 14th day of October, 1953 until paid, together with the further

sum of \$20,000.00 as and for a reasonable attorney's fee herein, and her costs and disbursements herein incurred.

Dated this 9th day of November, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1956.

[Title of District Court and Cause.]

Civil No. 7256

NOTICE OF APPEAL

Notice is hereby given that Underwriters at Lloyd's London, England, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 13, 1956.

Dated this 10th day of December, 1956.

MEINDL, MIZE & KRIESIEN;

By /s/ R. E. KRIESIEN,
Of Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed December 11, 1956.

[Title of District Court and Cause.]

Civil No. 7256

UNDERTAKING FOR COSTS
ON APPEAL

Whereas, Underwriters at Lloyd's London, England, defendant in the above cause, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain judgment made and entered in favor of plaintiff and against said defendant in the above court on or about the 13th day of November, 1956, which said judgment was and is for the sum of One Hundred Thousand Dollars (\$100,000), together with interest thereon at the rate of 6 per cent per annum from the 14th day of October, 1953, until paid, together with the further sum of Twenty Thousand Dollars (\$20,000) as and for reasonable attorney's fees herein, and for her costs and disbursements.

Now, Therefore, in Consideration of the premises and of such appeal, we, Underwriters at Lloyd's London, England, as principal, and Indemnity Insurance Company of North America, a Pennsylvania corporation, duly authorized to engage in the business of a surety in the State of Oregon and the State of California, do hereby jointly and severally undertake and promise on the part of said defendant-appellant that said defendant-appellant will pay all damages, costs and disbursements which may be awarded against it on said appeal.

Dated at Portland, Oregon, this 11th day of December, 1956.

UNDERWRITERS AT LLOYD'S LONDON,
ENGLAND;

By /s/ [Illegible],
Attorney in Fact.

[Seal] INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA;

By /s/ DONALD McCAMBRIDGE,
Attorney in Fact.

Countersigned:

STEVENS & BREWSTER,
/s/ BY HENRY C. O. STEVENS,
Oregon Resident Agent.

[Endorsed]: Filed December 11, 1956.

[Title of District Court and Cause.]

Civil No. 7256

SUPERSEDEAS BOND

Know All Men by These Presents:

That the Indemnity Insurance Company of North America, a corporation created, organized and existing under and by virtue of the laws of the State of Pennsylvania, and duly authorized to carry on a general casualty insurance business within the State

of Oregon and the State of California, and in the courts of the United States, is held and firmly bound unto Jane S. Lyons, plaintiff, in the full and just sum of One Hundred Sixty Thousand Dollars (\$160,000), to be paid to the said Jane S. Lyons, her administrators, executors, successors, or assigns, to which payment, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Signed and sealed this 19th day of December, 1956.

Whereas, on November 13th, 1956, in an action pending in the United States District Court for the District of Oregon, between Jane S. Lyons, as plaintiff, and Underwriters at Lloyd's London, England, as defendant, Civil Action No. 7256, final judgment was rendered in favor of the said plaintiff, Jane S. Lyons, and against Underwriters at Lloyd's London, England, as defendant, for One Hundred Thousand Dollars (\$100,000), together with interest thereon at the rate of 6 per cent per annum from the 14th day of October, 1953, until paid, together with the further sum of Twenty Thousand Dollars (\$20,000) attorneys' fees and costs taxed at Six Hundred Forty-five Dollars and Sixty Cents (\$645.60); and the said defendant, Underwriters at Lloyd's London, England, having filed a notice of appeal from such judgment to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of this obligation is such that if the said Underwriters at Lloyd's

London, England, shall prosecute its appeal to effect and shall satisfy the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Court of Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

[Seal] INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

By /s/ DONALD McCAMBRIDGE,
Attorney in Fact.

Countersigned by:

STEVENS & BREWSTER,
/s/ By HENRY C. O. STEVENS,
Resident Agent.

Approved: December 24, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed December 28, 1956.

[Title of District Court and Cause.]

Civil No. 7256

STATEMENT OF POINTS ON APPEAL

The points upon which defendant-appellant will rely on appeal are:

1. The court erred in failing to enter judgment for defendant.

2. The court erred in finding that the assured, James Alexander Lyons, on or about February 10, 1953, sustained bodily injury caused by accidental, violent, external and visible means which solely and independently of any other cause occasioned his death within three calendar months from said date.

3. The court erred in finding that said assured, James Alexander Lyons, suffered an injury, on or about February 10, 1953, from an accidental discharge of a shotgun which caused the assured's, James Alexander Lyons', death.

4. The court erred in finding that said assured, James Alexander Lyons, was a robust man for his age, was not suffering from disease, and that his death was not caused or contributed to directly or indirectly from disease or natural causes.

5. The court erred in considering speculative, incompetent and inadmissible evidence in finding for plaintiff.

6. The court erred in entering a judgment in favor of plaintiff, Jane S. Lyons.

7. The court erred in failing to find that the plaintiff failed to sustain her burden of proof by any competent, substantial evidence that the discharge of the shotgun preceded the onset of the fatal heart attack which caused the assured's, James Alexander Lyons', death.

8. That the court erred in failing to find that the plaintiff failed to sustain her burden of proof by any competent, substantial evidence that any bodily injury which may have been sustained by the assured, James Alexander Lyons, solely and independently of all other causes resulted in the assured's, James Alexander Lyons', death.

9. That the court erred in failing to find that the plaintiff failed to sustain her burden of proof by any competent, substantial evidence that the assured's, James Alexander Lyons', death was not caused or contributed to by a pre-existing heart disease.

Dated this 8th day of January, 1957.

/s/ R. E. KRIESIEN,

Of Attorneys for Defendant-
Appellant.

Service of copy acknowledged.

[Endorsed]: Filed January 8, 1957.

[Title of District Court and Cause.]

No. 7256

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents, consisting of Complaint, Answer, Order of Consolidation, Pretrial Order, Memorandum Opinion, Proposed Findings of Fact and Conclusions of Law, Proposed Supplemental Findings of Fact, Judgment Order, Notice of Appeal, Undertaking for Costs on Appeal, Supersedeas Bond, Statement of Points on Appeal, Designation of Contents of Record on Appeal, Order to Forward Exhibits to Court of Appeals, and Transcript of Docket Entries, constitutes the record on appeal from a judgment of said court in a cause therein numbered Civil 7256, in which Underwriters at Lloyd's London, England, is the appellant and defendant, and Jane S. Lyons is the appellee and plaintiff; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the deposition of Homer P. Rush, M.D. The exhibits, Nos. 1 to 44, and the transcript of testimony in this case and the companion case, Civil 7381,

Jane S. Lyons, Plaintiff, vs. Glens Falls Indemnity Co., Defendant, have been forwarded by Railway Express by the attorneys for the appellant.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 14th day of January, 1957.

[Seal] R. DE MOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15412. United States Court of Appeals for the Ninth Circuit. Underwriters at Lloyd's London, England, Appellant, vs. Jane S. Lyons, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed January 15, 1957.

Docketed January 17, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15412

UNDERWRITERS AT LLOYD'S LONDON,
ENGLAND,

Appellant,

vs.

JANE S. LYONS,

Appellee.

MOTION FOR CONSOLIDATION

Come now appellant and appellee by and through their respective counsel and move this court for an order consolidating the within case with that of Jane S. Lyons vs. Glenn Falls Indemnity Co., a New York corporation, Civil No. 7381, for printing and oral argument purposes.

In support of said motion attached hereto is affidavit of R. E. Kriesien, of counsel for appellant.

Dated this 8th day of January, 1957.

MAGUIRE, SHIELDS,
MORRISON & BAILEY;

By /s/ HOWARD K. BEEBE,
Of Attorneys for Appellee.
MEINDL, MIZE & KRIESIEN;

By /s/ R. E. KRIESIEN,
Of Attorneys for Appellant.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge;

/s/ WALTER L. POPE,

/s/ FREDERICK G. HAMLEY,
United States Circuit Judges.

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, R. E. Kriesien, being first duly sworn according to law, do depose and say:

That I am one of the attorneys for appellant in the within action and that the within action was consolidated with the case of Jane S. Lyons vs. Glens Falls Indemnity Co., a New York corporation, Civil No. 7381, for trial in the United States District Court for the District of Oregon by court order; that the issues of fact and law involved in the appeal are identical in each case.

Dated this 7th day of January, 1957.

/s/ R. E. KRIESIEN.

Subscribed and sworn to before me this 7th day of January, 1957.

[Seal] /s/ LEONA F. OSTROSKI,
Notary Public for Oregon.

My commission expires 7/11/59.

[Endorsed]: Filed January 18, 1957.

No. 15413

United States
Court of Appeals
for the Ninth Circuit

GLENS FALLS INDEMNITY CO., a Corporation,
Appellant,

VS.

JANE S. LYONS,
Appellee.

Transcript of Record
In Three Volumes

Volume I
(Pages 1 to 34)

Appeal from the United States District Court for the
District of Oregon

FILED

MAR 21 1957

PAUL P. O'BRIEN, CLERK

No. 15413

United States
Court of Appeals
for the Ninth Circuit

GLENS FALLS INDEMNITY CO., a Corporation,
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District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MEINDL, MIZE & KRIESIEN;
R. E. KRIESIEN,
1431 American Bank Building,
Portland 5, Oregon,
For Appellant.

MAGUIRE, SHIELDS, MORRISON & BAILEY;
ROBERT F. MAGUIRE,
HOWARD K. BEEBE,
723 Pittock Block,
Portland 5, Oregon,
For Appellee.



The United States District Court
for the District of Oregon

Civil No. 7381

JANE S. LYONS,

Plaintiff,

vs.

GLENS FALLS INDEMNITY CO., a New York
Corporation,

Defendant.

COMPLAINT

Plaintiff complains of defendant and for her
cause of action against it alleges:

I.

At all times mentioned herein plaintiff was and
now is a citizen, resident and inhabitant of the
State of Oregon.

II.

At all times mentioned herein defendant was and
now is a corporation duly organized and existing
under and by virtue of the laws of the State of
New York and was and is transacting an insurance
business in the State of Oregon.

III.

The amount in controversy herein exceeds the
sum of \$3,000.00, exclusive of interest and costs.

IV.

Prior to February 10, 1953, defendant in consid-
eration of a good and sufficient monetary premium

which was paid by James Alexander Lyons issued to said James Alexander Lyons a policy of insurance under the terms of which defendant promised and agreed that in case said James Alexander Lyons sustained bodily injury by accidental means resulting directly and independently of all other causes in death, it would pay to plaintiff the sum of \$5,000.00.

V.

Said policy was in full force and effect at all times mentioned herein.

VI.

On or about February 10, 1953, said James A. Lyons suffered fatal injuries by reason of the accidental discharge of a firearm and his death thereby directly resulted from and was caused by accidental means.

VII.

Plaintiff has performed each and every condition precedent upon her part to be kept and performed and has made claim to defendant for the said sum of \$5,000.00, but defendant has denied all liability under said policy and has failed and refused to pay said sum or any part thereof, and the said sum, together with interest thereon at the rate of six per cent per annum from February 10, 1953, is due and owing from defendant to plaintiff.

VIII.

The sum of \$5,000.00 is a reasonable sum to be

allowed plaintiff as attorneys' fees in the prosecution of this claim.

Wherefore, plaintiff demands judgment against defendant in the sum of \$5,000.00, together with interest thereon at 6% per annum from February 10, 1953, and for the further sum of \$5,000.00, as and for reasonable attorneys' fees and her costs and disbursements herein incurred.

/s/ ROBERT F. MAGUIRE,

/s/ HOWARD K. BEEBE,
Attorneys for Plaintiff.

[Endorsed]: Filed February 9, 1954.

[Title of District Court and Cause.]

Civil No. 7381

ANSWER

Comes now defendant and for answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

First Defense

I.

Admits paragraphs I, II and III of plaintiff's complaint.

II.

Denies each and every other allegation of plaintiff's complaint and the whole thereof, generally

and specifically, except as may be hereinafter admitted.

Second Defense

I.

Defendant alleges that prior to and on or about the 10th day of February, 1953, there was in full force and effect a standard accident policy in the principal sum of \$5,000.00 wherein James Alexander Lyons was the named assured and Jane S. Lyons the designated beneficiary.

II.

That under and by virtue of the terms and provisions of said policy, hereinbefore described, the principal sum became payable in the event the assured, James Alexander Lyons, sustained bodily injury caused by accidental means, which directly and independently of all other causes occasioned his death, and said policy specifically excluded death caused directly or indirectly, wholly or partly, by disease whether the disease was the primary, proximate or contributing cause.

III.

That under and by virtue of the terms and provisions of said policy, as a condition to the payment of said principal sum, the claim therefor was required to be substantiated by the submission to defendant of a satisfactory proof of death within the policy provisions and without the policy exclusions.

IV.

That plaintiff failed to submit to defendant satisfactory proof:

(a) That the assured sustained bodily injury through accidental means which directly and independently of all other causes occasioned his death, and

(b) That the assured's death was not caused directly or indirectly, wholly or partly, by disease whether the disease was the primary, proximate or contributing cause;

and defendant thereupon rejected plaintiff's claim.

Third Defense

I.

Defendant realleges paragraphs I and II of its second defense.

II.

Defendant alleges that if the assured, James Alexander Lyons, sustained any bodily injury prior to his demise, that:

(a) Said injury did not directly and independently of all other causes occasion his death;

(b) The assured, James Alexander Lyons' death was caused directly or indirectly, wholly or partly, by disease whether said disease was the primary, proximate or a contributing cause.

Wherefore, defendant demands judgment that the

complaint herein be dismissed and that it have its costs and disbursements of this action.

MEINDL, MIZE & KRIESIEN;

By /s/ R. E. KRIESIEN,
Of Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed March 8, 1954.

[Title of District Court and Cause.]

Civil No. 7381

PRETRIAL ORDER

On the 12th day of September, 1955, a pretrial conference in the above-entitled action was held in open court, before the Honorable William G. East, Judge of the above-entitled court; plaintiff was represented by Robert F. Maguire and Howard K. Beebe, of her attorneys, and defendant was represented by R. E. Kriesien and Ray Mize, of its attorneys.

Thereupon the following proceedings were had:

Agreed Statement of Facts

I.

That diversity of citizenship exists between the parties in that plaintiff is a citizen and resident of the State of Oregon and defendant is a foreign corporation.

II.

That the amount in controversy herein exceeds \$3,000.00, exclusive of interest and costs.

III.

That prior to the 10th day of February, 1953, Glens Falls Indemnity Co., a New York corporation, issued in the State of Oregon accident policy number 22148, in the principal sum of \$5,000.00, wherein James Alexander Lyons was the named assured and the plaintiff, Jane Lyons, the designated beneficiary, said policy being in full force and effect on the 10th day of February, 1953, said policy having been issued on December 9, 1935.

IV.

That under and by virtue of the terms and provisions of said policy, Plaintiff's Exhibit 1, the principal sum became payable to the plaintiff in the event the assured, James Alexander Lyons:

(a) Sustained a loss resulting directly and independently of all other causes from bodily injuries sustained and effected solely through accidental means.

(b) That the policy shall not cover death caused directly or indirectly, wholly or partly, by bodily or mental infirmity or by any other kind of disease.

V.

That on or about the 10th day of February, 1953, the assured, James Alexander Lyons, died in the

country called Los Llanos, Southern Territory of Lower California, Mexico.

VI.

That thereafter an inquest was held and an autopsy performed inquiring into the cause of the death of the assured, James Alexander Lyons, certified copy of which in Spanish is Exhibit 5 and the English translation thereof is Exhibit 5A, and the other certified copies in the Spanish is Exhibit 27 and the English translation thereof is Exhibit 27A; said exhibit numbers being, in the companion case, civil number 7256.

VII.

That there was duly recorded in the Book of Deaths for the year 1953, number One of the Civil Registry in the Port of San Jose del Cabo, Southern Territory of Lower California, Mexico, at pages 3, 4 and 5, as Act number 5, death certificate which certified that the cause of death of James Alexander Lyons was:

“That the cause of death was owed to an aortical insufficiency that probably provoked the sudden fatigue of the heart, having found moreover atheromatous deposits of the coronary arteries.”

A certified copy of the original in Spanish is Exhibit 4 and the English translation thereof is Exhibit 4A; said exhibit numbers being, in the companion case, civil number 7256.

VIII.

That plaintiff filed proof of death of James Alexander Lyons with defendant. Plaintiff's Exhibit 8.

IX.

That defendant rejected plaintiff's claim and more than six months elapsed thereafter before plaintiff instituted this action.

Plaintiff's Contentions

1. That James Alexander Lyons' death resulted directly and independently of all other causes from bodily injuries sustained and effected solely through accidental means.

2. Said death was not caused directly or indirectly, wholly or partly, by bodily or mental infirmity or by any other kind of disease.

3. Plaintiff is entitled to recover from the defendant the sum of the face amount of said policy, together with interest thereon at 6% per annum from February 10, 1953, until paid, and, in addition, the sum of \$5,000.00 as and for a reasonable attorneys' fee herein.

Defendant's Contentions

1. That on or about the 20th day of May, 1950, the assured, James Alexander Lyons, suffered an attack of coronary insufficiency.

2. That on the 3rd, 4th and 5th days of February, 1953, the assured, James Alexander Lyons, had a pre-existing heart disease which resulted in an

attack of coronary insufficiency to the extent that nitroglycerin was prescribed and the assured, James Alexander Lyons, was advised to refrain from doing any strenuous exercise such as lifting or tramping through the fields.

3. That on the 10th day of February, 1953, the assured, James Alexander Lyons, had a pre-existing heart disease.

4. That the assured, James Alexander Lyons, died as a result of a fatal heart attack due to the diseased condition of his heart and not as a result of an accidental injury and therefore is not entitled to recover under the terms and provisions of the policy of insurance involved herein.

5. That it is more, or as equally, probable the shotgun was discharged as a result of the assured, James Alexander Lyons, suffering a fatal heart attack as it is that the shotgun was accidentally discharged prior to the fatal heart attack.

6. That the proof of death submitted by plaintiff to defendant constituted an admission that a pre-existing heart disease caused or contributed with the injury, if any, in resulting in the death of the assured, James Alexander Lyons, and under the law as enunciated by the Supreme Court of the State of Oregon, such accident, if any, cannot be considered as the sole cause or the cause independent of all other causes of death.

7. That if it is established by competent, satisfactory evidence the shotgun was accidentally

discharged prior to the fatal heart attack, the superficial injuries sustained by the assured, James Alexander Lyons, and the resulting emotional shock, if any, would not have caused an aortic insufficiency or a coronary insufficiency without the existence of the pre-existing heart disease and that it was necessary for the pre-existing heart disease to co-operate with the injury, if any, to result in the death of the assured and under such set of facts under the law of the State of Oregon, such death was not an accidental death within the policy coverage.

8. That plaintiff failed to submit satisfactory proof the assured, James Alexander Lyons, accidentally discharged a shotgun prior to suffering a fatal heart attack.

9. That plaintiff failed to submit satisfactory proof that the assured, James Alexander Lyons,

(a) Sustained a loss resulting directly and independently of all other causes from bodily injuries sustained and effected solely through accidental means.

(b) That the death was not caused directly or indirectly, wholly or partly, by bodily or mental infirmity or by any other kind of disease.

10. That in the event plaintiff should prevail, plaintiff is not entitled to attorney's fees.

Issues of Fact

1. Is there any competent, satisfactory evidence that a shotgun was accidentally discharged which

inflicted bodily injuries prior to the assured, James Alexander Lyons, suffering a fatal heart attack?

2. Did any bodily injuries sustained by the assured, James Alexander Lyons, solely and independently of all other causes result in his death?

3. Did the assured, James Alexander Lyons, have a pre-existing heart disease?

4. Was the death of the assured, James Alexander Lyons, caused or contributed to by a pre-existing heart disease?

5. Was a diseased heart condition of the assured, James Alexander Lyons, the sole cause of his death?

6. In the event plaintiff is entitled to recover, was the proof of death filed with defendant sufficient proof of accidental death under the policy so as to entitle plaintiff to recover attorneys' fees as a result of defendant's denial of such claim and, if so, what sum would be a reasonable sum to allow plaintiff as attorneys' fees herein?

Exhibits

The following exhibits have been displayed by the parties, respectively, and are below enumerated and identified, the parties agreeing with the approval of the court that no further identification of exhibits is necessary. The parties admit the authenticity of the following exhibits, but reserve the right to object to their introduction into evidence on the grounds of irrelevancy, immateriality and incompetency.

It is stipulated between the parties that the exhibits in the companion case, Civil No. 7256, are referred to and are considered as exhibits herein, insofar as they may be applicable.

Plaintiff's Exhibits

1. Policy No. 22148.
2. Telegram Maguire, et al., to Glens Falls, February 16, 1953.
3. Letter Glens Falls to Maguire, et al., May 7, 1953.
4. Letter Maguire, et al., to Glens Falls July 28, 1953.
5. Letter Maguire, et al., to Glens Falls August 20, 1953.
6. Letter Glens Falls to Maguire, et al., August 24, 1953.
7. Letter Maguire, et al., to Glens Falls September 15, 1953.
8. Proof of loss.

Defendant's Exhibits

- 9.
- 10.
- 11.
- 12.

The parties and each of them reserve the right to adopt any or all of the above pretrial exhibits.

The foregoing is certified to be a record of the proceedings had at the pretrial hearing in this court, and it is

Ordered that the issues to be tried herein shall be those herein set forth as issues of law and fact;

It Is Further Ordered that the pretrial conference in this case having been held and participated in by all parties, the pleadings now pass out of the case and the foregoing pretrial order shall control the subsequent course of the trial and shall not be hereafter amended except by consent of the parties or by order of the court to prevent manifest injustices.

Done and dated in open court this 28th day of November, 1955.

/s/ EDWARD P. MURPHY,
United States District Judge.

/s/ HOWARD K. BEEBE,
Of Attorneys for Plaintiff.

/s/ R. E. KRIESIEN,
Of Attorneys for Defendant.

[Endorsed]: Filed November 28, 1955.

[Title of District Court and Cause.]

Civil No. 7256

MEMORANDUM OPINION

These are two actions by the beneficiary of two accident policies issued to James A. Lyons. The insured died on February 10, 1953, near Los Llanos, Lower California, Republic of Mexico, while on a hunting trip with a small party, including two well-qualified cardiologists, Drs. Rush and Chamberlain. The issue for resolution is whether or not the insured died by reason of bodily injury caused by accidental, violent, external and visible means, and whether that injury solely and independently of any other cause within three calendar months from the date of the accident occasioned the death. As a corollary to this issue, or as a further condition, plaintiff had the burden of proving that the assured's death was not directly or indirectly caused or contributed to, within the meaning of the contract, by disease or natural causes.

The trial consumed a considerable number of days. Six eminent heart specialists, and several other highly qualified medical specialists testified at great length. The court having been placed in the uninviting position of testing the sharply conflicting conclusions of the medical experts with respect to the manner of occurrence of the death, it has reviewed the testimony and the record, and has been convinced by a preponderance of the evi-

dence that the assured at the time of his death was a vigorous, robust man of normal health for his age; that the condition of his heart and arteries, while less than perfect when measured by a standard of perfection, was "normal" and "healthy" and not diseased within the meaning of those words for purposes of the policies in question; that on February 10, 1953, an accidental discharge of assured's shotgun resulted in injury to the assured to the extent of powder burns and at least one gunshot pellet being propelled into his face; that as a consequence of these bodily injuries a shock reaction commenced in the assured which terminated with heart failure; that although a heart which was perfect when measured on an absolute standard would have withstood the pain and shock of the injuries received by the assured, many hearts which are considered in view of the age and general condition of their possessors normal and robust, and not diseased within the meaning of the policies in question, might have succumbed to injuries and shock such as those received by the assured; that the assured in fact succumbed by reason of the injuries and resultant shock he accidentally sustained; and that the plaintiff has sustained his burden of proof on all matters before the court.

The wealth of evidence in this case is too great to permit of extended discussion. It may be noted briefly, however, that the autopsy report upon which defendants place reliance does not note the vital fact of the degree of diminishment of the aortic

lumen; that a diminishment in small part of the lumen, although noticeable, and properly noted by an autopsy surgeon, is nevertheless consistent with a properly functioning aorta; that in the absence of a detailed finding of the degree of diminishment of the lumen, the effect of such diminishment is left to speculation and surmise; that many men of the age group of the assured have some degree of diminishment of the aortic lumen without being diseased within the meaning of the policies; that the presence of atheromatous plaques on the aortic valves likewise is an insufficient notation upon which to found a conclusion of incompetence of the valves without some greater description of the degree of stiffness, warpedness, shrinkage, or other malfunction of the valves; that the autopsy report leaves the degree, if any, of malfunctioning of the valves a matter of speculation, for lack of a sufficient description of the degree, character, and effect of the atheromatous plaques discovered on the assured's aortic valves. Likewise, it may be noted briefly that defendant's expert witnesses did not have the same opportunity to observe the assured at close range and for a period of more than a day while he was engaged in strenuous activity and exertion, as did plaintiff's expert witnesses. The conclusions of defendant's expert witnesses that heart failure came on suddenly on February 10th are inconsistent with the conclusions of plaintiff's expert witnesses who had observed the deceased during periods of peak exertion and strain, greater

than any undergone by the deceased immediately before his death, and who had not detected any signs in the deceased's appearance which would have alerted their trained senses. Defendant's experts' other hypothesis of death, that the heart failure was brought on by a sudden sharp pain caused by a passing of a gallstone through the cystic duct, is made too remote and speculative a possibility and too unlikely a sequence of facts by the overwhelming weight of the other expert testimony in this case.

These brief observations are made not to represent the complete or exclusive basis upon which the court has made its findings, but only to answer some of the main contentions made by the defendant, out of deference to the extreme skill with which they, as well as counsel for plaintiff, have presented their case. All counsel associated with these cases are to be commended upon the manner in which they prepared and presented them. Let the prevailing party prepare findings of fact and conclusions of law in accordance with the Rule, if it is so desired.

Dated: October 12th, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed October 16, 1956.

[Title of District Court and Cause.]

Civil No. 7381

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on regularly for trial before the undersigned judge of the above-entitled Court, the Court having heard the opening statements of counsel, the evidence adduced by both parties and having considered the same, together with all exhibits received in evidence herein and the briefs of counsel, and being of the opinion that the plaintiff has sustained her burden of proof on all matters involved herein, the Court does hereby make the following:

Findings of Fact

I.

Diversity of citizenship exists between the parties hereto in that plaintiff is a citizen and resident of the State of Oregon and defendant is a New York corporation.

II.

The amount in controversy herein exceeds \$3000, exclusive of interest and costs.

III.

Prior to the 10th day of February, 1953, defendant issued in the State of Oregon its accident insurance policy No. 22148 in the principal sum of \$5000.

wherein James Alexander Lyons was the named insured and the plaintiff herein, Jane S. Lyons, was the designated beneficiary. Said policy was in full force and effect on the 10th day of February, 1953.

IV.

Under and by virtue of the terms and provisions of said policy, the principal sum thereunder became payable to the plaintiff in the event the insured, James Alexander Lyons:

(a) Suffered death resulting directly and independently of all other causes from bodily injury sustained and effected solely through accidental means; and

(b) Provided that such death was not caused directly or indirectly, wholly or partly by bodily or mental infirmity or by disease.

V.

On or about the 10th day of February, 1953, the said James Alexander Lyons died from bodily injuries which resulted directly and independently of all other causes and which were effected solely through accidental means; namely, the accidental discharge of his shotgun.

VI.

Said James Alexander Lyons was a vigorous, robust man of normal health for his age, and was not suffering from bodily or mental infirmity or from disease; and his said death was not caused

directly or indirectly or wholly or partly by bodily or mental infirmity or by disease.

VII.

On or about the 5th day of September, 1953, plaintiff submitted due proof of such death of said Alexander Lyons to defendant and more than six months has elapsed since said submission of such proof of death and defendant has failed and neglected to pay said principal sum, or any part thereof, to plaintiff.

And, based upon said findings, the Court does hereby make the following:

Conclusions of Law

I.

Plaintiff is entitled to recover of and from the defendant the sum of \$5000, together with interest thereon at the rate of 6% per annum from September 5, 1953, until paid.

II.

Under Oregon law plaintiff is entitled to recover of and from the defendant a reasonable attorney's fee to be later found and established by the Court and the Court does hereby reserve jurisdiction for the purpose of finding, fixing and awarding such attorney's fee.

III.

Plaintiff is entitled to recover her necessary costs and disbursements herein incurred.

Dated this 9th day of November, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1956.

[Title of District Court and Cause.]

Civil No. 7381

SUPPLEMENTAL FINDINGS OF FACT

It having been stipulated by the parties hereto that the issue of the amount to be allowed to plaintiff on account of a reasonable attorney's fee herein be submitted to the court for determination upon the record, the court does hereby make the following

Supplemental Findings of Fact

I.

The sum of \$1000.00 is a reasonable sum to be allowed plaintiff on account of attorney's fees herein.

Dated this 9th day of November, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1956.

The United States District Court
for the District of Oregon

Civil No. 7381

JANE S. LYONS,

Plaintiff,

vs.

GLENS FALLS INDEMNITY CO., a New York
Corporation,

Defendant.

JUDGMENT ORDER

The above-entitled cause came on regularly for trial without a jury before the Honorable Edward P. Murphy, Judge of the above-entitled Court, commencing on November 22, 1955, and concluding December 8, 1955. Plaintiff appeared in person and by Robert F. Maguire and Howard K. Beebe of her attorneys, and defendant appeared by Ray Mize and R. E. Kriesien, its attorneys. The respective parties introduced evidence upon the issues raised by the Pretrial Order and their counsel argued the law and the facts by briefs. The Court having considered the evidence, arguments and briefs, and having made its Findings of Fact and Conclusions of Law, now, therefore,

It Hereby Is Considered, Ordered and Adjudged that plaintiff recover of and from the defendant the sum of \$5000, together with interest thereon at the rate of 6% per annum from the 5th day of September, 1953, until paid, together with the further

sum of \$1000.00 as and for a reasonable attorney's fee herein, and her costs and disbursements herein incurred.

Dated this 9th day of November, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1956.

[Title of District Court and Cause.]

Civil No. 7381

NOTICE OF APPEAL

Notice is hereby given that Glens Falls Indemnity Co., a New York corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 13, 1956.

Dated this 10th day of December, 1956.

MEINDL, MIZE & KRIESIEN;

By /s/ R. E. KRIESIEN,
Of Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed December 11, 1956.

[Title of District Court and Cause.]

Civil No. 7381

UNDERTAKING FOR COSTS ON APPEAL
AND SUPERSEDEAS BOND

Whereas, Glens Falls Indemnity Co., a corporation, defendant in the above cause, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain judgment made and entered in favor of the above plaintiff and against said defendant in the above court on or about the 13th day of November, 1956, which said judgment was and is for the sum of Five Thousand and no/100 Dollars (\$5,000.00), together with interest thereon at the rate of Six per cent (6%) per annum from the 5th day of September, 1953, until paid, together with the further sum of One Thousand and no/100 Dollars (\$1,000.00) as and for a reasonable attorney's fee herein, and her costs and disbursements;

Now, Therefore, in consideration of the premises and of such appeal, we, Glens Falls Indemnity Co., a corporation, as Principal, and St. Paul Fire and Marine Insurance Company, a Minnesota corporation, duly authorized to engage in the business of a surety in the State of Oregon and the State of California, do hereby jointly and severally undertake and promise on the part of said appellant-defendant that said appellant-defendant will pay all damages, costs and disbursements which may be awarded against it on said appeal; and

Whereas, said appellant-defendant desires that execution on said judgment be stayed pending said appeal;

Now, Therefore, we do further in consideration thereof jointly and severally undertake and agree that if said judgment be affirmed, said appellant-defendant will satisfy it insofar as it may be affirmed in not to exceed the sum of Eight Thousand and no/100 Dollars (\$8,000.00).

Dated at Portland, Oregon, this 28th day of November, 1956.

[Seal] GLENS FALLS INDEMNITY
CO.,

By /s/ [Indistinguishable],
Secretary.

[Seal] ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,

By /s/ WILLIAM B. JOANSON,
Attorney-in-Fact.

Countersigned:

JEWETT, BARTON, LEAVY
& KERN;

By /s/ JOHN F. DOLON,
Oregon Resident Agent.

Approved this 17th day of December, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed December 19, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The points upon which defendant-appellant will rely on appeal are:

1. The court erred in failing to enter judgment for defendant.

2. The court erred in finding that the assured, James Alexander Lyons, on or about the 10th day of February, 1953, died from bodily injuries which resulted directly and independently of all other causes and were effected solely through accidental means.

3. The court erred in finding that said assured, James Alexander Lyons, suffered an injury, on or about February 10, 1953, from an accidental discharge of a shotgun which caused the assured's, James Alexander Lyons', death.

4. The court erred in finding that said assured, James Alexander Lyons, was a robust man for his age, was not suffering from bodily infirmity or from disease, and that his death was not caused directly or indirectly or wholly or partly by bodily or mental infirmity or by disease.

5. The court erred in considering speculative, incompetent and inadmissible evidence in finding for plaintiff.

6. The court erred in entering a judgment in favor of plaintiff, Jane S. Lyons.

7. The court erred in failing to find that the plaintiff failed to sustain her burden of proof by any competent, substantial evidence that the discharge of the shotgun preceded the onset of the fatal heart attack which caused the assured's James Alexander Lyons, death.

8. That the court erred in failing to find that the plaintiff failed to sustain her burden of proof by any competent, substantial evidence that any bodily injury which may have been sustained by the assured, James Alexander Lyons, directly and independently of all other causes resulted in the assured's, James Alexander Lyons', death.

9. That the court erred in failing to find that the plaintiff failed to sustain her burden of proof by any competent, substantial evidence that the assured's, James Alexander Lyons', death was not caused or contributed to by a pre-existing heart disease.

Dated this 8th day of January, 1957.

/s/ R. E. KRIESIEN,

Attorney for Defendant-Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed January 8, 1957.

[Title of District Court and Cause.]

No. 7381

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Order of consolidation; Pre-trial order; Proposed findings of fact and conclusions of law; Proposed supplemental findings of fact; Judgment order; Notice of appeal; Undertaking for costs on appeal and supersedeas bond; Statement of points on appeal; Designation of contents of record on appeal; Order to transmit exhibits to Court of Appeals and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7381, in which Glens Falls Indemnity Co., a New York Corporation is the appellant and defendant and Jane S. Lyons is the appellee and plaintiff; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that exhibits numbered from 1 to 44, inclusive, together with the transcript of testimony in this cause and Civil 7256, Jane S. Lyons, plaintiff vs. Underwriters at Lloyd's, Lon-

don, England, defendant have been forwarded by Railway Express by the attorneys for the appellant. The deposition of Homer P. Rush, M. D. is being forwarded with the transcript on appeal in Civil 7256.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District this 14th day of January, 1957.

[Seal] R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15413. United States Court of Appeals for the Ninth Circuit. Glens Falls Indemnity Co., a Corporation, Appellant, vs. Jane S. Lyons, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Oregon.

Filed: January 15, 1957.

Docketed: January 17, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15413

GLENS FALLS INDEMNITY CO., a New York
Corporation,

Appellant,

vs.

JANE S. LYONS,

Appellee.

MOTION FOR CONSOLIDATION

Come now appellant and appellee by and through their respective counsel and move this court for an order consolidating the within case with that of Jane S. Lyons vs. Underwriters at Lloyd's, London, England, Civil No. 7256, for printing and oral argument purposes.

In support of said motion attached hereto is affidavit of R. E. Kriesien, of counsel for appellant.

Dated this 8th day of January, 1957.

MAGUIRE, SHIELDS, MORRI-
SON & BAILEY,

By /s/ HOWARD K. BEEBE,

Of Attorneys for Appellee.

MEINDL, MIZE & KRIESIEN,

By /s/ R. E. KRIESIEN,

Of Attorneys for Appellant.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge;

/s/ WALTER L. POPE,

/s/ FREDERICK G. HAMLEY,
United States Circuit Judges.

[Title of Court of Appeals and Cause.]

AFFIDAVIT

State of Oregon,

County of Multnomah—ss.

I, R. E. Kriesien, being first duly sworn according to law, do depose and say:

That I am one of the attorneys for appellant in the within action and that the within action was consolidated with the case of Jane S. Lyons vs. Underwriters at Lloyd's, London, England, Civil No. 7256, for trial in the United States District Court for the District of Oregon, by court order; that the issues of fact and law involved in the appeal are identical in each case.

Dated this 7th day of January, 1957.

/s/ R. E. KRIESIEN.

Subscribed and sworn to before me this 7th day of January, 1956.

[Seal] /s/ LEONA F. OSTROSKI,
Notary Public for Oregon.

My Commission expires: 7/11/59.

[Endorsed]: Filed January 18, 1957.

No. 15412-15413

United States
Court of Appeals
for the Ninth Circuit

UNDERWRITERS AT LLOYD'S LONDON,
ENGLAND, Appellant,

vs.

JANE S. LYONS, Appellee.

GLENS FALLS INDEMNITY CO., a Corpora-
tion, Appellant,

vs.

JANE S. LYONS, Appellee.

Transcript of Record
(In Three Volumes)

Volume II
(Pages 39 to 464)

Appeal from the United States District Court for the
District of Oregon

No. 15412—15413

United States
Court of Appeals
for the Ninth Circuit

UNDERWRITERS AT LLOYD'S LONDON,
ENGLAND, Appellant,

vs.

JANE S. LYONS, Appellee.

GLENS FALLS INDEMNITY CO., a Corpora-
tion, Appellant,

vs.

JANE S. LYONS, Appellee.

Transcript of Record
(In Three Volumes)

Volume II
(Pages 39 to 464)

Appeal from the United States District Court for the
District of Oregon

In the United States District Court
for the District of Oregon

Civil No. 7256

JANE S. LYONS,

Plaintiff,

vs.

UNDERWRITERS AT LLOYD'S LONDON,
ENGLAND,

Defendant.

Civil No. 7381

JANE S. LYONS,

Plaintiff,

vs.

GLENS FALLS INDEMNITY CO., a New York
Corporation,

Defendant.

Before: Honorable Edward P. Murphy, Judge.

Appearances:

For Plaintiff:

MR. ROBERT F. MAGUIRE,
MR. HOWARD K. BEEBE.

For Defendant:

MR. RICHARD E. KRIESIEN,
MR. RAYMOND MIZE.

Proceedings

The Court: Jane S. Lyons vs. Underwriters at Lloyd's in London and Glens Falls Indemnity Co. Those two cases have been consolidated. I am ready to proceed.

Mr. Beebe: Plaintiffs are ready, your Honor.

Mr. Kriesien: Defendants are ready, your Honor.

Mr. Beebe: May the Court please, this is an action referring to the case of Jane S. Lyons vs. Underwriters at Lloyd's London upon two identical policies of accident insurance. One in the sum of \$75,000. The other in the sum of \$25,000. Consolidated in the case is a policy of straight accident insurance by the Glens Falls Indemnity Company in the amount of \$5,000. The policies issued by Underwriters at Lloyd's of London insured against death caused by bodily injury which resulted solely from external violent accident and visible means. The policy did not—that is to say, there was an exclusionary clause which excluded the indemnity if the death resulted or was caused or contributed to by disease or natural causes. The wording of the Glens Falls policy required that the death be caused wholly and independently of all other causes by external violence and accident, and there was an exclusionary provision which excluded death which was caused or contributed to by bodily infirmity or disease.

The insured under the policy was Mr. James Lyons, who was in the lumber business in Oregon

in Coos Bay, and he was a very successful man, a very active, dynamic and busy man, forty-nine years of age. He had just immediately prior to his death been on a very extensive business trip where he had a great deal [2*] of business responsibility, which had involved a considerable amount of traveling. When he returned from that trip to Palm Springs, where he maintained a home, as the evidence I hope will show, I believe that one of his children suffered from an allergic asthma and was required to live in a desert climate most of the time in the wintertime, and that he maintained a home in Palm Springs for his family. And that his doctor in Palm Springs, the family doctor, was Dr. William McBride, who was and is a specialist in internal medicine and who had treated Mr. Lyons, I again believe the evidence will show, and had given him repeated physical examinations once a year after 1950, and he went to Dr. McBride where he complained of pain in his chest, and I believe in the arm. Dr. McBride conducted a thorough cardiac examination including exercise tolerance tests and electrocardiograms, which proved to be within normal limits and he did blood tests on him and concluded that all the examination revealed no objective symptoms or signs of heart disease. The insured was contemplating a fishing trip with his partner, Mr. Howard Irwin and with Dr. Francis Chamberlain, a heart specialist of San Francisco. Let me say, Mr. Irwin was a friend of the doctor,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

and Dr. Homer Rush, a heart specialist of Portland.

He asked Dr. McBride whether he should go on this trip and Dr. McBride assured him that all his tests were perfectly normal and in his opinion, he was suffering from cardiac fatigue mainly, and emotional stress and fatigue from his work. [3]

Now, the evidence will show that the cardiac fatigue idea has been carried forward and is used generally to describe a pain in the chest and is based on exhaustion and nervous stress and does not necessarily involve the heart itself.

The party proceeded to the lower portion of Lower California peninsula in Mexico and there Mr. Lyons was observed by Dr. Chamberlain and Dr. Rush for a period of some three or four days I believe, and during that time he was subject to considerable physical exertion upon occasions as well as the ordinary things of life, eating, sleeping, resting and so forth. Indeed, upon one occasion, the day before his death, they were doing some deep-sea fishing and Mr. Lyons hooked a large marlin, and fortunately, we have for offer in evidence, motion pictures taken of this large marlin which he hooked and while it was leaping high out of the water, and the evidence will be that during that time he underwent a period of sustained exertion for a period of some twenty or thirty minutes without any evidence of shortness of breath or of other cardiac or heart symptoms. That following morning, together with a party of Mexicans, a Senor Ruiz, who was the port captain and had become ac-

quainted with the party, suggested they go shooting doves and on that morning, Mr. Lyons appeared to be in very good health. In fact, he commented upon how good he felt and how good it was to be alive on a morning like that, and they took an automobile and went up the shore to a point where Senor Ruiz had told them that the [4] doves flew over in great quantities. They had obtained some weapons. Mr. Lyons had a twelve-gauge magnum shotgun from the ship and Dr. Rush had a .22 rifle, and during some hour or so at least before the fatal occurrence, Dr. Rush and Mr. Lyons walked briskly up a hill and Dr. Rush specifically noted at the time that he himself was out of breath but that Mr. Lyons was displaying no symptoms of shortness of breath or any pain in the chest or anything of that nature.

They went on down to the place where they were to hunt doves. Dr. Chamberlain had a motion picture camera and he didn't have a gun, so when these promised doves didn't come, he went back down to the village.

Mr. Lyons was stationed at one spot where the doves flew over and in the terrain it was sandy and there were small desertlike bushes, mesquite bushes and Dr. Rush, a distance away where he could not see Mr. Lyons, but approximately sixty to a hundred yards, something of that nature. Soon after the doves did start to come over and Dr. Rush heard a shotgun explode several times and saw several doves fall to the ground and then he heard one shot and saw a dove fall. Shortly after that, just a few seconds, heard another blast of the shot-

gun. He was there with his own .22 rifle and had had no shots. He mentally thought, "Why is Jimmy killing all those doves? Why doesn't he let a few others come over so I can get a shot." So, some fifteen or twenty seconds went by and Dr. Rush heard a wheezing sound, which [5] he described as being like the snorting or breathing that would be made by an enraged animal, a very loud type of thing. They went to investigate, to find what it was and he found Mr. Lyons lying face downward with the extreme end of the barrel protruding from under his left shoulder and diagonally across. There was blood and powder burns on his face and he was, as I say, going through this stertorous breathing, this heavy breathing. Dr. Rush had, of course, no medical equipment there, so the first thought he had was to give artificial respiration, which he did. He felt the heart. He listened, of course, but he felt the heart and he felt not a beat, but a purring. He described it as though if a person had put his hand upon a cat that was sleeping, a purring sensation, and the insured was pulseless and cyanotic and died some five minutes or so afterward. That is to say, the breathing stopped. There was a frothy edema or liquid coming from his mouth. Dr. Chamberlain returned and took some pictures of the surrounding territory. However, at that time, Dr. Rush had turned the insured over and he was not in the same position, and Dr. Chamberlain took some pictures of the body and of the surrounding terrain showing the mesquite brush,

which we will offer in evidence later on. Thereafter, the Mexican officials took over. The party was advised under Mexican law the body has to stay right there, and they tried to protect it from the elements of the sun and insects and so forth, and put a tarp over it, and the legal machinery in Mexico went into operation. [6] Finally late in the evening, some time afterwards, an autopsy was performed by two Mexican doctors. In that connection, we have been attempting to and we have had some difficulty in getting a precise translation of the autopsy report, because of the available interpreters and the translators here did not seem to be able to cope with the exact meaning of the words in Mexican medicine and it was only last night that we were finally able to contact a Mexican who is a resident, who gave the best translation of the autopsy, so far as the significant meanings of the autopsy. The evidence will show your Honor that there was found upon dissection of the coronary arteries, atheromatous deposits, and I might say, that that is a form of arteriosclerosis.

Mr. Kriesien of counsel for the defendant went to Mexico and interrogated Dr. Serrano, one of the Mexican doctors who performed the autopsy. We were not present, but he did interrogate him, and he prepared the page and the translation which will be offered, and those are all the facts which both parties have been able to develop on this matter.

But, to return to the autopsy findings, there were these atheromatous deposits which diminished the

coronary arteries in caliber. When Mr. Kriesien went to Mexico, the doctor testified that it was impossible to say the extent to which they were diminished.

He also found some thickening and some atheromatous plaques on the aortic semilunar valve. He found a slight dilatation in the auricular ventricular ring, the mitral valve, which I understand is utterly insignificant in this matter. The conclusion as to the cause of death reached by the Mexican doctors that it was due to aortic insufficiency. That is to say an insufficiency of the aortic semilunar valve, which resulted in a sudden acute heart failure.

One translation by a translator said that the aortic insufficiency brought about a sudden heart fatigue. But the Mexican doctor says that means an acute heart failure.

The evidence concerning the autopsy by Dr. Lehman, a pathologist of Portland, Oregon, who examined the remains after it was returned from Mexico, and incidentally, he didn't find much, because it had been completely cleaned, no viscera, including even the brain had been left in the body. He did find the lacerations and the powder burns, but his testimony will be that the facts stated in autopsy do not support the conclusion of the Mexican doctors, that there was an aortic insufficiency.

His testimony will be, and that of Dr. Rush and Dr. Chamberlain, that in any man over forty years, all males over forty will develop atheromatic

plaques on the coronary artery and on the semilunar valves. It's a very common thing to find that in men over forty. It is rare, it is the exception to the rule that they do not have it. But it is believed, and the medical testimony will be for the plaintiff by Dr. Rush and Dr. Chamberlain, that what occurred here was that this man here had [8] this shotgun go off close to his face, inflicting burns and pain upon him, and shock, and that that created a situation which I would rather have him explain, your Honor, but it is the effect that the heart muscle was put under a load which required it to have a greater amount of blood for its own operation and the shock not only produced that, but produced a situation where the heart could not get enough blood for its own operation. And the heart therefore went in an arithmia or lack of proper beat, and went into a ventricular fibrillation, which is a fluttering heart movement and irregular beat, and he expired. The medical reasons for that are definite, and I couldn't possibly state them to you, but generally, those are the facts for the purpose of a brief opening statement. It is the theory of the plaintiff, if the Court please, first, that it is the law that the word "disease" as used in an accident policy of this kind has a special meaning in the law. The word "disease" is actually rather ambiguous in one scientific meaning. In the scientific sense of the term, it means that any departure whatsoever from a perfect state of health is characterized as a disease. The testimony will be that there is almost

nobody in the world that is free under that definition, and it is the plaintiff's theory and we contend that under the laws the courts have held that a contract which would apply that type of meaning to the word "disease" is an absurdity and absolutely headed for futility, and for the purpose of an insurance contract of this kind, the [9] word "disease" means a morbid or serious condition, sufficient so that it interferes with the vital functions that would be considered by a layman, a departure, a significant departure from what we might call a normal state of health, and our evidence will be that that was the case here. This man did not have anything significantly wrong with him. He simply had the thing that almost all men of his age had, and the evidence will be that he was able to do all the ordinary things and do them with vigor, that he was able to undergo strenuous exercise so that his heart was good enough to stand all those. But the only thing that caused it was the sudden shocking traumatic injury of this nature that brought about his death.

The theory is based upon other authority that under such circumstances, even if there were some disease within the meaning of the policy, it was not a contributing cause, but merely a condition which was acted upon by the accident to result in the death.

In that connection, the policy language causes—it uses the words "cause and contributed," and it must contemplate the rules of law relating to causation, so that we contend that this is a case under

the fundamental rule, that here was simply a man with possibly a chest condition at the very most, which was operated upon and was simply unable to resist the effects. It was not a case of a deceased part being aggravated to produce the injury. But simply a weakened condition in the sense that the arterial channel was narrowed, which was unable to handle the [10] traumatic shock. And that, if your Honor please, is the plaintiff's opening statement.

The Court: Just a moment. Are we in a position to take up the other matter, Mr. Clerk?

The Clerk: No, sir.

Mr. Kriesien: If the Court please, in addition to the facts as outlined by the plaintiff, we wish to state that we believe the evidence will show that in May of 1950 the insured, when he was walking across a lumber dock was stricken with a constricting pain in the chest and arm to the extent that he could not hold a telephone.

In February of 1953, the evidence will show that on the 3rd day of February, he was stricken with constricting chest and radiating arm pains, that he sought medical advice from a Dr. McBride and that pain persisted for three days, February 3rd, February 4th, and February 5th. That Dr. McBride prescribed nitroglycerin to relieve the pain condition; that Mr. Lyons inquired about going on this fishing trip and that Dr. McBride advised him that he could do so providing that he refrained from doing any extensive work, such as

heavy lifting or tramping through the fields, and he thereupon departed upon this trip.

I think the facts are substantially as outlined by Mr. Beebe concerning what transpired at La Paz, Lower California. The primary cause of death in the Mexican autopsy was aortic insufficiency and the secondary cause of death given was coronary insufficiency. [11] They gave as an independent cause of death, superficial scratches on the face; gun-powder marks or burns and gallstones. It is, as we believe, pertinent that the man had two gallstones and there was a gallbladder condition that may have been the precipitating cause of an onset of a coronary insufficiency. Based upon the autopsy, the death certificate was issued which gave as the direct cause of death an aortic insufficiency. It is the defendant's position in this case that the plaintiff failed to file a proof of death which showed a loss within the insurance coverages, but to the contrary, affirmatively established that the accidental injury suffered by the insured did not wholly and independently of all other causes result in his death, and that the diseased condition of the heart, either caused or was the contributing factor in the heart death, and the evidence will show by Dr. Rush, that this man did suffer a heart death.

Now, in Oregon, the burden of proof is upon the plaintiff to establish that the accidental injuries solely and independently of all other causes resulted in the death. That a diseased condition did not contribute to or cause the infirmity, or death, I should say.

Now, it is our position in this case that there is no competent satisfactory evidence that the shotgun was accidentally discharged prior to the assured sustaining a fatal heart attack, and it is our further position that there are two basic issues for determination by this Court. [12]

Number one is whether the plaintiff can overcome the *prima facie* evidence of the cause of death as established by the death certificate and establish by competent satisfactory evidence that this shotgun was discharged prior to the assured suffering the fatal heart attack. If the plaintiff sustains that burden of proof, then a second issue will arise and that is whether the diseased condition of the assured's heart caused or contributed to his death, and we believe the factual issues are quite simple and involve those two factors. As I say, the second one will not arise until after the first one, in connection with the question of whether the diseased heart condition contributed to the death. I believe the testimony of Dr. Rush himself will be, and was, upon the taking of his deposition, that a discharge of a shotgun and the emotional upset or reaction or reflex from the fear and the infliction of the superficial injuries, could not have resulted in death, if it had not been for the aortic insufficiency and the coronary insufficiency and under those sets of circumstances, it is the position that the plaintiff will be unable to prevail in this case.

Mr. Beebe: We will call Mr. Robert F. Maguire.

Mr. Maguire: I may say, your Honor, I am one of the counsel in this case, and inasmuch as the

Court, of course, understands the ethics and the rules of the Court here, I am not permitted to argue the facts in the case. I don't know whether your Honor has a definite rule with regard to an attorney testifying and [13] participating in the examination of the witnesses, but merely not to argue the facts. Of course, I am quite anxious to follow your Honor's ruling on that, if I can be advised.

The Court: I have no particular ruling on that, I usually leave that up to counsel if they have no objection, why, it's all right with me.

Mr. Kriesien: I have no objection. [14]

ROBERT F. MAGUIRE

was thereupon produced as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Beebe:

Q. Your name is Robert F. Maguire?

A. It is.

Q. What is your age, Mr. Maguire?

A. Just reached sixty-nine.

Q. What is your occupation, sir?

A. Attorney at law.

Q. And you are an officer of this court?

A. I am.

Q. Are you a special officer of this court?

A. Yes, I have been standing master in chancery since 1917, until under the new statute, I became

(Testimony of Robert F. Maguire.)

master of the court and I have held that position ever since.

Q. Were you the attorney for Mr. James A. Lyons during his lifetime?

A. I was attorney for Mr. Lyons; I was attorney for the booming company they had, Irwin-Lyons Lumber Company, and for Rolando Lumber Company, which was a California—you might say a subsidiary—as well as his personal attorney.

Q. Are you generally familiar with Mr. Lyons' financial condition? [15] A. Yes, I was.

Q. Generally, what was it?

A. Oh, he and his wife, and they were partners in the Irwin-Lyons Lumber Company, probably net worth was considerably in excess of \$1,500,000, and I think the state appraised it.

Q. Were you the attorney or executor of the Estate of James A. Lyons?

A. The firm was, and I and Mr. Smith of our firm have been handling it since before the probate.

Q. How long, Mr. Maguire, had you known Mr. James A. Lyons during his lifetime?

A. I think we first became acquainted, and we became acquainted when I became attorney for the Irwin-Lyons interests, about 1936. It may have been '37, but I think it was about '36.

Q. During that period of time, had you been personally in contact with Mr. Lyons frequently or on many occasions?

A. Quite frequently. While this would not prob-

(Testimony of Robert F. Maguire.)

ably apply to every month, I would say that as a rule I was down at the mill, which is at Coos Bay, which is some two hundred odd miles down the coast, at least once a month and would be there on those trips for from two days to maybe a week or ten days, and of course, I had to do his wills, I had a bunch of his personal business during this entire period, and on occasion he would come to Portland, and he had occasion to go back East, to Chicago and St. Paul on business trips, which the latter largely had to do [16] with the acquisition of timber holdings which would be contributory in which the logs would be brought to the mill. We became, in the course of the years very close friends and our families were very close friends.

Q. From your knowledge of the business and his part in it, are you familiar with the amount and type of work that he did; the amount and type of work that he did?

A. Yes. He had gone to sea; he had worked in the woods as a faller and buckler; he had worked in the sawmills; he was an exceedingly active man. While not a tall man and not a heavy man, he was well-muscled and I have been out in the woods with him and all over the south fork of the Coos River and their timber holdings based in the south fork—and many occasions I have been up there when we had litigation for the rights of way and over franchises, and we tramped, at times, up and down the canyon trails. I have been out with him to look at timber, and the incidents of the rights of

(Testimony of Robert F. Maguire.)

way getting into the timber on—oh, I'd say at least conservatively on six or seven occasions, but I think it was probably more.

He was a man of terrific drive, both physically and mentally. He knew every branch of the lumber business, even to the machinery. Many of their—one of the things they devised there during the time—before the logging and trucking industry—log truck industry were using diesel, he devised a means of using in their motors butane and he designed the method. [17]

Mr. Kriesien: If the Court please, I'd like to interpose an objection. This is very interesting, but I don't think it has any relevancy to this case.

The Court: It may be, but the background of the decedent is always of some help to the Court. I will overrule the objection.

The Witness: In addition to that, I won't say on every occasion, but most occasions, when I was down at Coos Bay from '43 or '44 on, he was developing a large ranch which was some five or six miles south of Coos Bay and he would be out driving tractors, the bulldozers, and he was a chap who was on the go all the time. They, in addition to their logging and lumber industries, they also had at one time three or four steamships which were engaged almost entirely in transporting the cut lumber from their mills, what we call rough lumber that the smaller mills would get, carrying it down to the California market. They had an office, a branch in Los Angeles and Rolando Lumber Com-

(Testimony of Robert F. Maguire.)

pany, as I say, in San Francisco and then these various activities around the Bay. Mr. Lyons devised a new method of handling lumber in packing it and loading and unloading lumber which has been a definite help to lumber shipping trade. He was a developer of many things. He was not only a Jack-of-all-trades, but he was a master of a good many of them. He was exceedingly alert, nervous energy as well as physical energy. In fact, he run me ragged in the years when I was a lot younger than I am. [18] He was considerably physically vigorous.

Q. (By Mr. Beebe): What was Mr. Lyons' attitude and his approach toward his work; was it an easy approach or did he give a lot of himself?

A. He went into it, you might say, whole hog. It was his life and his great interest outside of his family interest.

Q. Mr. Maguire, did you have any knowledge of the transaction that Mr. Lyons was engaged in, concerning the purchase of the boat which he had made those trips on to New York just prior to his death?

A. I was familiar with the details. I was familiar with the reasons why he went. The matter of the drafting of the contracts. I spent several days down in Coos Bay. The difficulty arose when the fellows were inclined to back out of it. I know all of those details of it, of my own personal knowledge.

Q. Was that an important matter to the Lyons'

(Testimony of Robert F. Maguire.)

interest? A. Oh, yes. He was a large shipper.

Q. Are you familiar with—were you going to say——

A. It was considerably larger than the other ships they had. Very considerably larger or whether it was a Victory ship. I can't remember now whether it was a Liberty ship. It was a very large ship.

Q. But they wanted badly to acquire it?

A. Yes; because Mr. Lyons, at that time, was proposing to get a ship and engage in the inter-coastal trade in lumber. The ships [19] they had were operated Pacific Coastwise and this would be able to go to the Eastern Coast, and instead of shipping by rail—and I don't want to give the impression that all of their shipments prior to this time were in their own ships or offshore ships, of course they sold lumber abroad which went on other ships. They weren't interested in that, but this was a new venture, and they were exceedingly interested. It was because of the difficulty in New York, and the sellers had their office in New York—I am trying to be as accurate as I can—I think it was about two weeks or two weeks and a half before the occurrence in California, he was back there for several days and we were negotiating, attempting to negotiate with the Wenasha Woodware Company, which had timber holdings up in the basin, the south fork where the Irwin-Lyons interests were, they had their road system which, at that time, I imagine would be—oh—twenty-five to thirty-five

(Testimony of Robert F. Maguire.)

miles in length, main traveled road. Of course, we had had a number of conferences, that was down in Coos Bay, and the Wanasha people desired to have local counsel here go over the matter, and an appointment had been made for the manager of Wanasha Woodward Company and their two men in charge of their logging to come to Portland and Mr. Lyons and I to meet with them in my office. The date had been fixed and Mr. Lyons took the night plane, and to go across the country, he was up all night. We met as soon as he could get to the room, change his clothes and get a bath and shave and come to my office. [20] We had rather spirited discussions, because Wanasha Woodward Company knew particularly what their interests were and Irwin-Lyons knew, Mr. Lyons knew what Irwin-Lyons interests were. It was very spirited and it went on for hours. I tried to see whether I had any memorandum as to the number of days he was in Portland. It was more than one day. It might have gone as long as three, but it certainly got into the second day, and after that, he left to go down, first to the mill, and whether he was going to San Francisco on his way down to Palm Springs, I don't know, but I know he was going to Coos Bay, and well—that brings that to the end. The hours were long. He did not seem exhausted, except—or tired, except in the morning or, say, immediately after he had been up all night, but his mind was clear. He was vigorous and we arranged to have lunch together. I think one night we had

(Testimony of Robert F. Maguire.)

dinner together and we walked from our office up to the club, which was something like six blocks and he was stepping—while I have got a good long stride, I was having to extend myself to keep up with him.

Now, at that time, there was the question of re-writing his and Mrs. Lyons' wills. I may say that I had drawn the first wills sometime, I think early in the '40's, along in—I have forgotten the date that Congress had posted the Marital Reduction Act, and it was necessary for tax purposes to avail themselves of that. I tried for a number of months to get Jim, and I had been down to the mill or talking on the phone that we [21] get together and get your will drawn up and straightened out. He laughed and would say, "All right." Finally—I was concerned about it because they had a company plane, they had a good commercial plane. It was a twin-engine Beachcraft. There have been—once or twice particularly in the wintertime when they were flying from Coos Bay to somewhere, they had run into icy conditions and on one occasion had a good deal of difficulty in making a landing. I kept telling him, "You're riding in that plane; Irwin is riding in that plane and your wives sometimes ride in the plane, and if that thing don't stay up there and you don't have a modern will, why, you're going to be out." Sometimes I got him on the phone and then he had gone on down to Palm Springs, and I said, "I want to get down there if you're not going to come up to Portland." So he flew up

(Testimony of Robert F. Maguire.)

in their own plane, he was not the pilot, to Coos Bay and from Coos Bay up here and Mrs. Lyons stayed down there so Mr. Lyons and I got on the plane and we flew down to Palm Springs, and I drew their will. I would say they are rather long wills, because both of them had matters of trust for the benefit of the children and some various state taxes and to take advantage of the marital deductions. We couldn't get a stenographer in Palm Springs, so I had to write it down in shorthand and read it to him and had them execute it with witnesses, and then I carried it back to Portland. I had it put in typewritten form and sent the form. Now, while we were there, we were there several days, they had their cottage or [22] house on the Choke Tree Ranch property, the south part of it, and Jim was quite a hunter and he loved wild life. He tramped all over the place, and up to the foothills and in the canyons. He wanted to show me a field bird—I am not a hunter—and I think it was a kind of quail, rustic quail or Mexican quail. It was not the kind of quail we have up here, and then we went down—we tramped over the duck club, we went down to see that and tramped over that. He was interested in the duck club, and we tramped over the fields and looked at the tractors and the seeders, and he was just going all the time.

They had two children, and after the elapse of a number of years, in November of 1952, they had a second little girl, and there was a question of

(Testimony of Robert F. Maguire.)

whether they wanted to make any special provisions for that child in the wills, because they had made gifts to the two older children and those were held in guardianship. Well, I tried to get Jim to come up or let me come down there and go over it, but he was busy and finally on this trip, I said, "Those wills ought to be drawn. If that plane of yours goes down, you have got a lot——"

Q. On the trip, you refer to the business trip?

A. When he came from his business trip to New York and we had these conferences. Well, in the original will Mrs. Lyons had made some special gifts of jewelry, and I said for him to talk to Jane and see what she wanted to do and he said he would see what she wanted to do in connection with Sally. Well, I waited [23] several days and I didn't hear from him. I called him up and I said, "What does Jane want to leave to the baby?" He said, "I think she wants to give the new baby a pearl necklace." I think it was from her jewelry, and that, I am quite sure, was the day before he left on this fishing trip. It couldn't have been more than two days.

Q. You are referring to the fishing trip upon which he died?

A. On which he died, yes. I had started out—I had a rough draft of his will and I hadn't started on Mrs. Lyons' will because I didn't know what she wanted to do. I may say this, he certainly showed no particular interest in getting the will

(Testimony of Robert F. Maguire.)

changed to cover the new baby. He didn't hurry about it and I guess that's that.

Mr. Beebe: That's all, Mr. Maguire.

Cross-Examination

By Mr. Kriesien:

Q. Mr. Maguire, do you know whether or not Mr. Lyons suffered from gout during the period of years that you knew him?

A. This year—I would think it was somewhere in '49, '50 or '51, I probably could look through my files and get that. He had an automobile accident in Coos Bay on a frosty morning, the car skidded to avoid some youngster on a bicycle. He was thrown from the car. He had a number of broken ribs, his nose was broken and he was badly bruised all over. I saw him, I went down there, not because of the injuries but on business. He [24] had just come home from the hospital. Thereafter, he commenced to show some symptoms of gout. I can speak of this, because there was a claim under the policy for the accident and for the treatment and disability rising at that time. Dr. McKeown was his attending physician there, Dr. McKeown of Coos Bay had the thought that it would be good for him to go down there and get out in the sunshine. I don't know precisely how long he was laid up with that.

The Court: What were his living habits, Mr. Maguire; was he a heavy eater?

(Testimony of Robert F. Maguire.)

The Witness: No, I wouldn't say that he was. I noticed that particularly when we were visiting in Palm Springs. The food was good but it was not lavish. Certainly I would say, although they had help, that their table was probably less amount of food or variety of food than one would expect. No, I wouldn't say he was a large eater.

The Court: Was he a heavy drinker?

The Witness: Occasional drinker, I don't know whether he was a heavy drinker—don't misunderstand me—when I was out with him and he—for a number of months I know he would not take a drink at all. But certainly it was never except for social occasions when we went out to dinner or there at Palm Springs that I think we probably had a couple of cocktails, maybe a couple of highballs. Now, that is my limit of knowledge on that, my own personal observations. I know that for months he didn't [25] drink at all.

Q. (By Mr. Kriesien): Did you ever have occasion to talk with Ross McKeown of Coos Bay about Mr. Lyons' health?

A. Yes, I did. That was the time when there was a question as to whether or not the gout was of traumatic origin and I—and we were negotiating with the insurance company. I negotiated—it was Lloyd's, wasn't it—I believe it was Lloyd's on that and the question was whether or not there were occasions of gout at the time he was put on the plane to go down to Palm Springs. I did discuss with Dr. McKeown about that and I don't know

(Testimony of Robert F. Maguire.)

whether you want me to testify about what our conversation was, but I will be glad to do it, I don't want to volunteer it.

Q. Mr. Maguire, I believe it was Glens Falls instead of Lloyd's that covered that. Could you be mistaken on that?

A. I could be very well mistaken on it.

Q. Did Mr. McKeown ever advise you that Jim Lyons had to slow down and take it easy?

A. No.

Q. Did he ever advise you about the occurrence on May 12, 1950, about Mr. Lyons?

A. You mean at the time?

Q. Or thereafter?

A. Yes, he talked to me about it by long distance telephone on Saturday and I think a number of—no, I am afraid not, that was on the gout proposition. That's the only one I can be certain [26] of was the one recently—on last Saturday.

Q. When you talked to Mr. Lyons the day before, the day or two before he was leaving on this fishing trip; did he tell you about the fact that he was having pain in his chest and radiating pain down his arm? A. No.

Q. Didn't indicate that he was sick at all?

A. No.

Mr. Kriesien: That's all.

(Witness excused.)

The Court: Call your next witness.

Mr. Maguire: Call Mr. Hawk. [27]

WALTER C. HAWK

was thereupon produced as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maguire:

Q. Will you state your full name, Mr. Hawk?

A. My full name? Walter C. Hawk.

Q. And do you have a nickname, that you are known by? A. Normally called Chick Hawk.

Q. What is your business?

A. I am a gunsmith, sir.

Q. Is that gunsmith? A. Yes.

Q. Here in the City of Portland?

A. Yes, for a number of years.

Q. About how many years have you worked as a gunsmith?

A. Well, right close on to the half-century mark.

Q. And what makes of guns are you familiar with?

A. Just about all of them, I guess, however, I am more familiar with some than I am with others.

Q. Are you familiar with this gun which you just brought to the courtroom? A. Yes.

Q. What make is that? [28]

A. That is a Winchester Model 12 magnum shotgun.

Q. Are you familiar with that make of gun?

A. Very muchly.

(Testimony of Walter C. Hawk.)

Q. Are you a representative or do you have any connection with the Winchester arms?

A. I have a gunsmith's agreement which has been in effect many years with the Winchester Repeating Arms Company and also another designation from the Owen Corporation who now owns Winchester and that agreement entitles me to obtain and replace and repair all of those intricate parts which the average individual would not have access to. I believe that covers it.

Q. This gun which I have immediately in front of me was delivered to you by whom?

A. Mr. William Morrison.

Q. From Maguire, Shields, Morrison and Bailey?

A. I beg your pardon?

Q. Now, we have not put any testimony as to where the gun came from, if I may inform counsel.

Mr. Kriesien: You may assure me that this is the gun that was in his possession.

Mr. Maguire: I will now state for the record, that this gun was delivered to me after Mr. Lyons' death by Mr. Howard Irwin, who is one of his business associates and who was the owner of the yacht on which they were making this trip. After receiving it from him, I put it in the vault of the Union Pacific Company [29] Legal Department where it remained until Mr. Morrison, one of my partners, took it out to Mr. Hawk. About how long ago, Mr. Hawk, approximately?

A. Well, I could look on my record. I don't

(Testimony of Walter C. Hawk.)

exactly recall the date, but it's probably been two or three weeks ago.

The Court: Will you accept that statement?

Mr. Kriesien: I accept it, yes, sir.

Q. (By Mr. Maguire): I would like to have this marked as an exhibit. While the clerk is doing that, I am going to ask Mr. Hawk to open it.

A. I should have opened it when I carried it in, however, I am positive that there isn't anything in it.

Q. There is nothing in it?

A. No, there is not. It is perfectly in the clear.

The Court: Are you offering that in evidence for identification or what?

Mr. Maguire: I am offering it in evidence now, your Honor.

The Court: Let it be received.

Mr. Kriesien: No objection.

The Clerk: Marked Plaintiff's Exhibit 1.

(Whereupon, a Winchester Model 12 magnum shotgun, marked Plaintiff's Exhibit 1, was offered and received in evidence.)

Q. (By Mr. Maguire): When you received this gun, Mr. Hawk, did you make an examination of it and its mechanism? [30]

A. Completely, yes.

Q. You took it entirely apart?

A. Yes, I disassembled it. I was very careful when I did it, because I was told to be very careful and make sure that it was looked over thoroughly.

(Testimony of Walter C. Hawk.)

Q. Very well. Did you clean it?

A. I wiped the barrel out because there was some rust in the barrel, however, I didn't clean the action, I merely examined it thoroughly and then replaced it as it was. The gun has some residue and dirt in the action which is accumulative over the period of the use of the gun and I left that as near intact as possible.

Q. Did you cock it and pull the trigger before you disassembled it?

A. Did I cock it and pull the trigger?

Q. Yes, before you disassembled it?

A. Oh, yes, sir. What I done was take the gun down and took the action right out, that was what I was told to do and I didn't—I don't recall—I might have operated it. I don't think that I did because I simply turned it over. I can do the same thing in half a minute or less. All I got to do is take one screw out and take this action apart.

Q. Now, what can you say as to the length of the barrel of that gun, as compared with that of the ordinary shotgun?

A. This particular gun here has what is known as a 32-inch full choke [31] barrel on it, which is two inches longer than the average gun of this type. This is a magnum shotgun and ordinarily they have 30-inch barrels.

Q. What can you say—or withdraw that. When you speak of a magnum, what does that refer to; what does that mean?

A. The magnum is a specially designed and a

(Testimony of Walter C. Hawk.)

specially built gun that will take a shell which is considerably more powerful than the regular, what is commonly called the express field load. In other words, there is more powder and more shot in the shell, and the shell is of longer length. It is three inches over all and the average shell is two and three-quarter inches and the powder charge in the magnum is heavier. Likewise the amount of shot is heavier than the straight express load.

Q. What is the difference in powder load in a magnum shell of that caliber—for that caliber gun as compared with the powder load in the other kind of shell? You say the ordinary shell?

A. Well, in your express load you have a three and a quarter or a three and a half grams of powder and you have one and one-quarter ounces of shot. In the magnum load, which is heavier and a longer shell, you have four and a quarter grams of powder—that is bulk measure, of course—and you have one and five-eighths ounces of shot and that is in the heaviest load. Now, of course, this gun will operate as effectively with any load that is around that par as it would with a magnum. It can be used in the field. These guns are ordinarily what is known as [32] a field load and then if we want a lot of extra soup or pressure for reaching right out there, then they would put the heavier shell in it. It shoots both directions.

Q. Well, what do you mean by that?

A. Well, it backs up just as much as it goes forward. I am not husky enough to handle one myself.

(Testimony of Walter C. Hawk.)

Q. Well now, have you made any measurements of that gun and have you those measurements written down?

A. Yes, I—if it is permissible—I think I have it in my mind. However, the total length of the gun over all is 51 inches from butt to muzzle and I will check it to make sure. I think it was $13\frac{3}{4}$ inches from the trigger to the base of the recoil pad and $37\frac{1}{4}$ inches from the muzzle to the trigger. Now, do you want the weight of the gun?

Q. Yes, if you will.

A. Well, I didn't weigh it, but I know approximately what they weigh around $8\frac{1}{4}$ pounds.

Q. Did you make any other measurement of the gun other than you have described?

A. Nothing, except the—I know what the regulation stock length is and this stock is $\frac{1}{4}$ of an inch shorter than the average regulation stock. It has evidently been cut back and made to fit some individual.

Q. Now, after—have you made tests as to the condition of the mechanism of the gun, as to whether it was in good working [33] order?

A. Oh, yes. The gun is in perfectly legitimate working order to the best of my knowledge and from what I can determine. I did check the gun to see if it could be bumped hard enough to cause it to explode or to cause the trigger to release itself with the live primer in the chamber. Of course, now, I didn't put a loaded shell in this, I simply took a

(Testimony of Walter C. Hawk.)

loaded shell and removed the powder and shot and left the primer intact and then placed it in the chamber and closed the action, left the safety lock disengaged and then rammed her onto a cement block not once, but a number of times trying to see if it was possible to cause the trigger mechanism to operate. In fact, I struck it so hard that the inertia of the firing pin itself would make a very, very, very slight impression in the primer. But not enough to explode it and I don't think that it could be struck hard enough to cause the gun to discharge unless it was tripped by the trigger, and the safety lock would have to be off to do that.

Q. When you say you jammed it on the cement floor, was the safety off, at that time?

A. Oh, yes.

Q. And is the safety on that gun what—strike that. That question was, does the safety on that gun do anything with respect to the operating mechanism?

A. When the safety lock—the trigger lock as we call it—or the safety lock as commonly known, it's a crossbar lock, that [34] when the lock is placed into position it locks the trigger completely against the sear, which is an integral part of the hammer. It is a notch that is cut into the hammer itself and there is a spring under the trigger which engages the trigger itself against the notch in the hammer lock and whenever this crossbar is pushed over to lock that, it is absolutely solid. It cannot be moved one way or the other. Then, when it is re-

(Testimony of Walter C. Hawk.)

leased, there is a notch in the safety lock which leaves enough room so that the trigger can be pulled back far enough to release the sear from the hammer notch and that in turn releases the hammer and of course that in turn hits the striker. Now, I noticed and checked that very thoroughly for the simple reason that sometimes, it isn't commonly that way, but I have run into one or two in the last fifteen or twenty years that the safety lock would become worn enough that it would allow a creepage in the trigger which in turn would not allow the gun to be discharged when it was pulled back but it would hang and then when the safety lock was released it would go off. But this doesn't show that at all. This is in perfect operation so far as the mechanism is concerned.

Q. Well, when the hammer hits the shell, it hits—what do you call that—a cap?

A. Well, that's all, the first firing pin, that is a striker, we call it the striker. It's the firing pin.

Q. Well, the hammer hits the firing pin; is that it? [35]

A. Yes, the firing pin—I have one of them here in my hand (indicating). This is inserted, it's fastened into the block, in the breach block which is the block that stands behind the shell and this is a reciprocating part of the block itself and it has a safety lock on it which disengages the action until the block is completely into position and locked so that there could be no chance of a blow-back or gas escaping or anything of that nature,

(Testimony of Walter C. Hawk.)

and before you can pull the trigger on this particular weapon it must be locked into position, and when it is locked into position, then the firing pin is automatically released in the block so that it slides back and forth. It travels, oh, not over three thirty-seconds of an inch and it is not an integral part of the hammer. The hammer, it works from a different part of the gun and when it is released it simply comes up on a camber and it strikes on the end of the firing pin, which drives the firing pin forward and it touches the detonator or powder.

Q. What is the nature of the material in that detonator?

A. There are several different solutions. In different ammunition, there are different solutions that are used. However, they are all more or less in the nature of—they are a mercuric composition, all right, ordinarily.

Q. I have heard of fulminate of mercury, is that—

A. Fulminate of mercury is ordinarily the solution used. Now, there are different forms of it. [36]

Q. Well, I don't think—we don't need to go into that. It is made up of something which is in solution?

A. It's in solution when it is poured and then it hardens. Just the same as you make matches. They are in solution when you dip them, too, but they harden.

Q. I see.

A. And then on the inside of the detonator

(Testimony of Walter C. Hawk.)

there is a little anvil which is placed in there which sets up against the primer cup or the battery cup of the shell itself and then this anvil sits in solidly and there is a space in between which is loaded with this primer solution, and the instant that is aggravated by contact or by the blow or by heat or anything that will disturb it, causes a flash, the same as the flash of a match when you strike it. That, of course, kits forward and ignites the powder which develops the gases which drive the load from the end.

Q. I see. Now, did you test the trigger for the trigger pull? A. Did I test it?

Q. Test the trigger for the pull?

A. You mean for the amount of pressure necessary——

Q. Yes.

A. Yes, I put the regular scale, regular trigger scale, which is not—they are not completely accurate—but they are very, very close to it, within possibly an ounce or maybe less than that. I would say a lot less than that, but I will be conservative and [37] say within an ounce and the trigger pull on this gun, testing it from different angles, there is a slight deviation like pulling against one side or the other, but the very least pull that I could bring on it was approximately $4\frac{1}{4}$ pounds, and the heaviest pull I could produce was very close to 5 pounds.

Q. Now, how did that trigger pull compare with

(Testimony of Walter C. Hawk.)

the ordinary trigger pull of the kind of gun of that kind?

A. It is heavier than the average pull on a magnum. They are usually heavier than most other guns due to the enormous amount of recoil, but this type of gun is only set to be manually operated, and consequently it is not as necessary to have a heavy trigger as is on this particular type of gun as some of the others. With a lighter pull, the recoil of the first one might kick the next one off, but I would say that this is an average normal trigger pull. Ordinarily my own guns I use it about—in this particular type of weapon, approximately 3 to 3¼ pounds.

Q. In other words, if I may approach the witness, your Honor, if you pull this trigger, it takes more pressure than it would the ordinary gun?

A. Yes, it would. That is, than the average gun. Of course, some of them are heavier than that, but most of them are not.

Q. Now, did you make any tests of taking an instrument and pulling it across the trigger?

A. Yes, I did that. [39]

Q. Not directly back and forth, but across it?

A. Yes. It can be tripped by putting a finger across there and tripping it if you want to do it.

Q. Now, is that gun, assuming that in going through the brush or underbrush and if it caught on a twig, would that gun go off; could that discharge the gun?

A. Well, certainly, it could. It could discharge

(Testimony of Walter C. Hawk.)

by swinging and hooking on a bootstrap if it happened to strike the trigger. Sure it could, you bet your life. Any gun can if the safety lock is off.

Q. I see. But if you had the safety lock on, whether it is pulled against a piece of wood, a trigger or twig or anything like that, it couldn't be discharged?

A. No, you could take a hammer and pound it, you could break the trigger, but you cannot discharge it otherwise, you would have to break something to do it.

Q. Now, is there any way or—strike that. Is there such a thing as a defective primer or what do you call it? A. Yes.

Q. If there is a defect in the cap, would a shell explode?

A. Well, from a jar or something of the kind it could, yes, it could.

Q. Have you known instances where a gun did discharge, when a trigger was not activated?

A. I know of two instances where revolvers were—not a revolver— [40] one was an autoloading pistol, that were dropped and those guns did discharge without the primer being crimped in the gun. I don't know of any cases where a gun has discharged from a defective primer. Of course, primers, that would be one in a million or something of the kind. That is possible, yes. It is possible a jar could do it.

Q. What kind of a defect would have to exist in the primer of a shell to enable this to happen, what you just testified about?

(Testimony of Walter C. Hawk.)

A. A crack through the solution from—well, for instance, if you had poured solution in the primer itself and that was to have been cracked in some manner or broken so that there would be the tiniest type of friction, then it was jarred so that those two or those integral parts of that solution itself, which is itself not unlikely, that it could happen to go off, but it would be the same thing as handling a dynamite cap and sticking a needle into it. The heat from the needle would be enough to explode it, and if those parts in there were jarred and if they happened to be fractured in any way, those parts of the solution itself, it is possible that it could ignite. I dropped a shotgun shell one time on the floor and it went off. It just went off. That's all. It was right out of a brand new box. Now, that could happen, but it's very, very, very seldom that you ever hear of anything of that kind and in fact, it's so seldom that a lot of people think you are crazy if you talk about it. I have witnessed two occasions that did explode that way over a period [41] of forty years.

Mr. Maguire: You may inquire.

Cross-Examination

By Mr. Kriesien:

Q. Mr. Hawk—— A. Yes, sir.

Q. To discharge this shotgun by having it come into contact with a twig, do I understand that that twig would have to exert a pressure of approximately $4\frac{1}{4}$ to 5 pounds? A. It could, yes.

(Testimony of Walter C. Hawk.)

Q. And it would require a tugging on a twig, would it not?

A. Yes, it would require a striking or a pulling blow or whatever you might want to call it of that much, because that is what the trigger registers and reads.

Q. And likewise, you mentioned about a contact with a bootlace, that would also have to be caught—or bootstrap—and exert a pressure of $4\frac{1}{4}$ to 5 pounds?

A. Any type of pressure that was put on the trigger, providing the lock is disengaged, and that it is in the firing position, it wouldn't make any difference how it was done, you could drop a rock on it or strike it and it would knock it off or you could hook it onto something and it could knock it off. There is a thousand ways that those things happen. They happen every day. You pick up the newspapers and read about it, because he didn't have his safety lock set. [42]

Q. All right. Mr. Hawk, one other question. In your examination of that gun, was it plugged or would it hold five shells?

A. Well now, I didn't take the magazine down because that had nothing to do with the action. I don't think—I can tell you in about a half a minute by examining it right here. I never removed the magazine at all.

Q. Would you be so kind as to examine it, Mr. Hawk?

A. Yes, you bet. I didn't have any idea about the magazine, because this bolt up here is going

(Testimony of Walter C. Hawk.)

up the barrel and the forearm, and this is the best end right here, in here (indicating). I can mighty soon tell you, all I have to do is check it with a pencil. This magazine is plugged, sir.

Q. Thank you, you may resume the stand, Mr. Hawk. What do you mean by a plugged shotgun?

A. Well, you see in certain states, such as Oregon, Washington and quite a number of the states, they have a law in effect, it's been in effect for some time, that no gun could be used in the field with over three loads in it. That is in a shotgun and these guns are built to take five shells in the magazine and one in the barrel or one in the barrel or four in the magazine and it is according to the length of the magazine on them, they will then function and operate five shots without reloading, and consequently there has to be a firm plug in it that couldn't possibly be removed unless you disassemble it. So that in the states where this law is in operation, if you [43] got caught out in the field with a gun that will function and operate even though you have only got it loaded with three shells, if they check it and find out that it will take more, you are subject to confiscation and so on and so forth.

Q. Then, as I understand it, Mr. Hawk, this gun being plugged would hold two shells in the magazine and one in the chamber?

A. Two in the magazine and one in the chamber, that's correct. That is two magnum shells as

(Testimony of Walter C. Hawk.)

I notice there from the length of the pencil, that I don't think it—well, it wouldn't be possible to even put three field loads in the magazine, according to the length of the pencil, unless my guess is way off.

Q. Thank you, Mr. Hawk, that is all.

The Court: You may be excused, sir. Next witness.

Mr. Maguire: Call Mr. Neal. [44]

LEONARD LEROY NEAL

was thereupon produced as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maguire:

Q. Where do you live? A. Coos Bay.

Q. How long have you lived in and around Coos Bay, Coos County?

A. Around that area most of my life, right at Coos Bay about twenty years.

Q. What is your business? A. Logging.

Q. And have you run a logging business of your own? A. Part of the time, yes.

Q. And have you acted as the logging superintendent or woods superintendent for any concerns?

A. Yes, for Irwin-Lyons.

Q. How long were you employed by Irwin-Lyons?

A. Just a little bit of a guess, but I think about sixteen years.

(Testimony of Leonard LeRoy Neal.)

Q. During all of the time, were you engaged as woods superintendent? A. That's right.

Q. What were your duties?

A. Oh, generally woods supervision. [45]

Q. Does that mean you were in direct charge or supervision of the logging crews?

A. That's right.

Q. Your logs being loaded out from the woods, was that under your supervision?

A. That's right, the whole operation.

Q. The whole woods operation. Where was the—where were the logging operations of Irwin-Lyons Logging Company for five or six years prior to 1953?

A. Well, they are on the south fork of the Coos River, out from Coos Bay, I'd say from thirty miles to fifty along in this stretch of country.

Q. Did the Irwin-Lyons Lumber Company build roads into this district themselves?

A. That's right.

Q. Did you have anything to do with the road building? A. Would you repeat that?

Q. Did you have anything to do with the road building?

A. Well, yes, considerable, about the same as the rest of the logging operations.

Q. I take it you were well acquainted with Mr. James A. Lyons; were you not? A. Sure was.

Q. How long had you known him?

A. Well, I have always known of him, probably twenty-five years, knowing him very well.

(Testimony of Leonard LeRoy Neal.)

Q. Had he had any woods experience?

A. Oh, all of his life, more or less.

Q. And had he had any sawmill experience?

A. Yes, a great deal.

Q. Can you state whether or not he was mechanically inclined? A. Very much so.

Q. When you were employed as woods superintendent, did you have any occasion to see and be with him frequently?

A. Oh, quite often, yes. He was very much out to see what was going on. I have been out in the woods with him a lot.

Q. And what can you state as to his vigor or activity? A. Well——

Mr. Kriesien: May I inquire as to what time?

The Witness: Well, I always figured he was very much alive in traveling around, I had to try to keep up with him mostly, rather than him with me.

Q. (By Mr. Maguire): When was the last—possibly how long before Mr. Lyons died was the last time you and he went into the woods together?

A. Well, I can't say.

Q. Approximately. One month, three months, six months or a year?

A. Probably not more than two months, I'd say anyway.

Q. And was that up in the basin of the south fork of Coos River? [47] A. That's right.

Q. By the way, what is the nature of the land; is that land rugged land or what is the situation?

A. Well, they said there was to be flats that we

(Testimony of Leonard LeRoy Neal.)

were going to log on, but I never found them. It was pretty rugged.

Q. And in order to go over a piece of woods work when you were laying out a road or looking at timber, you had to do that on foot?

A. Well, we had to go ahead of all roads and look at the timber and check the roads out and so forth.

Q. And did that involve physical exertion of any extent, going and looking those things over?

A. Very much so.

Q. Now, did you have an opportunity—strike that. Did your duties require you to come into the mill office there at North Bend?

A. Yes, occasionally I was in there quite often.

Q. And did you have any occasion there to discuss your duties and the program of the company in logging?

A. Yes, I made it a point to be in there quite often to talk it over with them in regards to the work out in the woods. He was my boss.

Q. I see. You saw him quite often in regard to the work. Well, as between Mr. Irwin and Mr. Lyons, which one of those two would you say you came into contact with? [48]

A. Well, with Mr. Lyons, practically all my activities.

Q. Now, at any time, did you ever see or know of anything regarding any physical disability of Mr. Lyons' breathing or color or anything of that kind?

(Testimony of Leonard LeRoy Neal.)

A. I never noticed or never heard him complain, he never complained to me.

Q. He was as active in the last year of his life as he had been in the previous years?

A. Well, I would think so, pretty much. Of course, I myself had slowed down quite a lot. I couldn't have noticed, but it seemed to be about the same.

Q. You said he made no complaint about being able to breath or having pain or anything like that at any time to you?

A. Not to me. I never noticed anything like that.

Q. What can you say as to what his temperament or energy or lack of energy?

A. Well, I always figured he had too much energy.

Q. I think you may inquire.

Cross-Examination

By Mr. Kriesien:

Q. I believe you stated, Mr. Neal, that the last occasion you had to be with Mr. Lyons was some two months prior to his death?

A. It could have been right around there, he was up in the woods.

Q. Were you aware of the time when Mr. Lyons had his gout [49] condition? A. No.

Q. He never mentioned that to you?

A. No.

Mr. Kriesien: That's all.

The Court: You may step down, Mr. Neal. It's almost twelve-twenty.

Mr. Maguire: Your Honor, we could possibly put in the testimony of Dr. McBride.

The Court: Let the record show that I am thoroughly familiar with the deposition of Dr. McBride. The record will show that I have read it and will read it again.

Mr. Maguire: Thank you, your Honor, then may we have the original filed with the Court and received in evidence, if the Court please?

The Court: Yes, that will be received in evidence.

Mr. Maguire: In that case, your Honor, we might just as well adjourn. We have no short witnesses or anything of that nature.

The Court: We will adjourn until two o'clock.

Mr. Kriesien: If the Court please, I have a short memo here as to the laws as I promised the Court I would give it.

The Court: This is in response to the memo filed?

Mr. Kriesien: Not in response, just a separate memorandum.

The Court: Very well, thank you. Two [50] o'clock.

(Whereupon, at 12:20 p.m., the noon recess was taken until 2:00 p.m., after which proceedings were had and done as follows:)

The Court: Proceed.

Mr. Maguire: May it please the Court, we would like to offer in evidence exhibits which I would like to have marked.

The Court: It may be received and marked.

(Whereupon, exhibits were marked as Plaintiff's Exhibits 3, 4, 5, 6 and 7 for identification.)

Mr. Maguire: At this time, may the Court please, the plaintiff offers in evidence exhibits numbered 3, 4, 5, 6 and 7, which have been so marked for identification in evidence.

The Court: They will be received. May I inquire was the deposition of Dr. McBride No. 2?

The Clerk: Yes.

Mr. Maguire: If your Honor please, Exhibits Nos. 5 and 6 for identification are the Glens Falls Indemnity Company policies and the proof of the loss that apply to the case in that connection, and in connection with the proof of loss, if your Honor please, it is stipulated between counsel that the same exhibits were attached to this proof of loss document as were attached to Exhibit No. 7 for identification, which is the proof of loss to Lloyd's, and the doctor's affidavits and so forth. Counsel don't have them, and he asked to see them and we are agreed that these were the same as to both proof of loss [51] that is in—that is the inclusion.

Mr. Kriesien: So stipulated.

Mr. Maguire: So we now offer them in evidence.

The Court: They will be received in evidence.

Mr. Kriesien: No objection.

(Whereupon, Plaintiff's Exhibits Nos. 3, 4, 5, 6, and 7 were offered and received in evidence.)

Mr. Maguire: Your Honor can read them at his leisure.

The Court: Very well.

Mr. Maguire: If your Honor please, we have a motion picture operator and his equipment coming, and we were wondering if we could put Mrs. Lyons on, and withdraw her as soon as he comes?

The Court: That will be satisfactory.

Mr. Maguire: Will you take the stand, Mrs. Lyons? [52]

JANE S. LYONS

the plaintiff above named was thereupon produced on her own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maguire:

Q. Will you state your full name, please?

A. Jane S. Lyons.

Q. Jane S. Lyons?

A. Jane Sullivan Lyons.

Q. And you are the widow of James A. Lyons, the deceased in this lawsuit? A. I am.

Q. What was Mr. Lyons' age at the time of his death? A. Forty-nine.

Q. When were you and Mr. Lyons married?

A. 1936.

(Testimony of Jane S. Lyons.)

Q. How many children were born of that marriage? A. Three.

Q. And their names and ages?

A. Their present ages are James Stuart Lyons, our son, now 15. Susan Jane Lyons, 12. Sally Atha Lyons, 3.

Q. Sally was the baby that was born in November of '52, was she not?

A. November 15, 1952.

Q. November 15, 1952. At the time you married Mr. Lyons, what [53] was his business?

A. He was in the lumber business.

Q. In what? A. Lumber business.

Q. Sawmill or logging or what?

A. Sawmill and logging.

Q. At that time, with whom was he associated?

A. I beg your pardon?

Q. At that time, with whom was he associated?

A. Howard W. Irwin.

Q. And that was prior, was it not, to the organization of the Irwin-Lyons partnership; isn't that true? A. Yes.

Q. At that time, did they operate what was known as Mill B? A. Yes.

Q. And there were certain logging companies procured and the lands in the woods?

A. That's correct.

Q. Now, about what was Mr. Lyons' general physical characteristics as to height, weight or whatever? You just explain it as well as you can.

A. His height?

(Testimony of Jane S. Lyons.)

Q. That's right.

A. Height 5 foot 8 inches, weight 165 pounds to 160 pounds and what was a very [54] energetic personality, a busy man.

Q. Well, that was at the time you were married or during the time of your married life together, were there any changes? A. Of what aspect?

Q. I mean as to his activity.

A. Oh, he was always—always had been a very active person. I could see no difference from the time we were married until the time of his death, so far as his general characteristic of being an active person.

Q. Was he interested in his business?

A. Very definitely.

Q. Do you know whether or not he went out in the woods to look at timber or the operations during this period?

A. Yes, that was definitely his interest and all in the business and his knowledge, so that he spent a great deal of time in the actual operation of the business.

Q. You and Mr. Lyons acquired a rather large farm out in the outskirts of Coos Bay about five or six miles south of the city; didn't you?

A. That's correct.

The Court: Mr. Maguire, would you mind speaking a little louder? I am not deaf, but there is so much noise, that I have difficulty hearing you sometimes.

Mr. Maguire: I have been having a good deal of

(Testimony of Jane S. Lyons.)

dental work done, and I have a considerable amount of difficulty. What was [55] the last question, Mr. Reporter?

(The question was read.)

Q. (By Mr. Maguire): And about when did you acquire that property?

A. Over a period of years we owned the ranch property where the house is now situated, which we term the south side of the road at the time we were living in town before we moved to the ranch, perhaps six years before we moved there. After we moved there a period of four years ago, we acquired more property.

Q. The property you call the south side property, is the south side of the county road; is that correct; that bridge across the slough?

A. Yes.

Q. And the rest of the property is to the north of that? A. Yes, it is.

Q. About how many acres is embraced in that?

A. A total of close to 500 acres.

Q. Did Mr. Lyons run cattle on that property?

A. Yes, we had Black Angus breed.

Q. And you raised horses?

A. That's right.

Q. I am not speaking about farm horses, were they blooded horses? A. Yes.

Q. Did he take any interest in the running of that ranch as well as other business interests? [56]

A. Yes, he did.

(Testimony of Jane S. Lyons.)

Q. Did he work there at the ranch in off hours or week ends with the actual operation of the ranch?

A. To a certain extent. We kept hired help on the ranch.

Q. Do you remember the occasion when the meadow fields to the north of the road were diked and floodgates put in there?

A. Yes. As to just exactly when that was, I don't remember.

Q. And did he take interest in that?

A. Yes, he was supervising that to see that it was done according to the way it should be.

Q. Was he a man of quite placid disposition or was he an active person?

A. Certainly not quiet or inactive, very active.

Q. What can you say as to whether that continued up to the time of his death?

A. Activity? Yes, very definitely.

Q. Now, I believe you and he acquired a piece of residence property in Palm Springs several years before Mr. Lyons died?

A. Yes, we did.

Q. And did you build on that?

A. Did we build upon it?

Q. Yes. A. Yes, we did.

Q. But you did not purchase the house?

A. No, we built the house. [57]

Q. And did Mr. Lyons supervise that and take an active interest in the improvement of that property?

A. To the extent that we were there during the building, which was done in the summer months but

(Testimony of Jane S. Lyons.)

we made frequent trips to consult the architect and to supervise, but not there during the actual building time to any extent.

Q. Now, that was on what was known as the Smoke Tree Ranch property; was it not?

A. That is correct.

Q. And did Mr. Lyons take any interest there in any hunting clubs or—not at Coos Bay—or Palm Springs, down in Palm Springs proper, but it was in the valley? A. Yes.

Q. Now, was there any—perhaps, your Honor, so we could get rid of this gentleman with the movie camera now?

The Court: Yes.

Mr. Maguire: You may step down, Mrs. Lyons. Would it be satisfactory, your Honor, if we put the screen up on this table (indicating)?

The Court: Surely, any place that is convenient.

Mr. Maguire: I may say, your Honor, that those pictures which we are now about to display were taken by Dr. Chamberlain. He is going to take the stand later and I would like, with your Honor's approval, that as they are being shown, Dr. Chamberlain, who is in the court now, give the narrative of where [58] and what circumstances these pictures were taken and we will then put him on the stand for testimony. While that is going on, your Honor, we may have the roll of film marked for identification?

The Court: Let it be marked.

Mr. Beebe: Counsel has seen it and we now offer it in evidence.

The Court: It may be received in evidence.

The Clerk: Plaintiff's Exhibit 8.

(Whereupon, Plaintiff's Exhibit 8 was offered and received in evidence.)

Mr. Maguire: Doctor, will you be sworn, please?

FRANCIS CHAMBERLAIN

was thereupon produced as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maguire:

Q. All right now, as the film starts, Dr. Chamberlain, I want you to explain it.

A. This film was taken about twenty-four hours before the accident, when we were on the boat between Frales Bay and Cape San Lucas, this is Lower California. In the vicinity—this is our ship with the fishing gear out as we were fishing for marlin.

Q. And when you see an individual in the pictures, will you please tell who they are?

A. Yes. I don't think I have to explain that I am an amateur. That's Dr. Rush and Mr. Lyons just behind him as they are fishing. Dr. Rush in the foreground and James Lyons in the background. We had our gear out for fishing for marlin, we were us-

(Testimony of Francis Chamberlain.)

ing the small rod, and the scene that we are just about to see, is where Dr. Rush is about to get a Sierra mackerel and Mr. Lyons is just beyond. That's Dr. Rush and Mr. Lyons is just beyond Dr. Rush. That's Howard Irwin with the high cap there pulling in the small fish. A Mexican pulling in Dr. Rush's Sierra mackerel and this was—it don't show—this was a fish that [60] we lost. Those are porpoises over in the distance that are all diving. The next scene will be the marlin—there is the marlin. Those are—those are porpoises, I am sorry. Now, this is going to be the marlin which Mr. Lyons has hooked. Now, you can see it jump. We estimated it to be about 200 pounds and to be about six feet long, and this one he played for about a half an hour. This was the first marlin I had seen, but the boys and the old-timers explained that this was a good-sized one. In fact, it was so big that finally it broke the line and we lost it, after Mr. Lyons played it for about a half an hour. The Mexican boy who is standing there—that's the pole that is up—that Jim Lyons' line is playing the fish with and now the fish has broken the line. This is Cape San Lucas and the entrance to the harbor as we came in. That's at the very tip of Lower California where we landed and stayed, it was on shore. That's looking at the country on the shore where we were hunting doves. This is the area just in back——

Q. Well, there seems to be a fairly flat level ground there and the hills in the back?

A. Yes. This is Mr. Lyons on the ground and

(Testimony of Francis Chamberlain.)

Homer Rush is pointing out the car and the road nearby, the mesquite bush and the sand.

Q. Is that Mr. Lyons' body?

A. That's Mr. Lyons' body against the mesquite brush and Dr. Rush pointing. That is Senor Ruiz, the port captain who took us on [61] the hunting expedition. That's where we go in and out of town to try to get word to the police and the village up above. Just the scenes of the town while we waited to try to get word through to the police. That's Mr. Howard Irwin going into the telegraph office. This is just a small Indian village of about 3,000 people at the tip of Lower California, and it was about a mile and a half from this little village where the accident occurred. Dr. Rush there, and I don't think there is any more pertinent—I am not sure—it's been quite a while since I've seen this film.

Q. You had taken some other film?

A. I took two more rolls of film back at the body, including all of the inquest, and the local physician, the man who was in charge of the autopsy, insisted that I destroy, in their presence, the two rolls of film.

Q. However, this one you saved?

A. I had gone back to the ship to get more films and had left this one on board. No explanation was given to me as to why, but we were in trouble and anxious to please the locals so that I didn't object.

Mr. Maguire: If it please your Honor, we happen to have blown up in black and white several pictures of the body lying there.

(Testimony of Francis Chamberlain.)

The Court: That's what I was going to ask you.

Mr. Maguire: I think we can proceed, your Honor.

The Court: Very well.

Mr. Maguire: Mr. Clerk, I would like to have you mark and [62] give exhibit numbers to these three photographs.

The Clerk: Plaintiff's Exhibits 9, 10 and 11.

(Whereupon, three photographs were marked by the clerk as Plaintiff's Exhibits Nos. 9, 10 and 11 for identification.)

Mr. Maguire: May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Maguire): I hand you here, Doctor, a photograph which is marked Exhibit 9 and see if you recognize that.

A. Yes, I do. Dr. Rush is in the foreground and Mr. Lyons in the background.

Q. That's one of the pictures that were on the film? A. Yes, sir.

Q. Except not in color, and then I hand you a photograph marked Exhibit 10 for identification, can you state what that is?

A. Yes, that's Mr. Lyons' body lying in the sand after the accident.

Q. Was that taken after he had been moved and the tarp or blanket or what not put down?

A. It was when I first saw him and I was about a mile away at the time of the accident, and I didn't see him before that tarp had been put there.

(Testimony of Francis Chamberlain.)

Q. I see. The next is Exhibit 11 and Exhibit 11 is what?

A. Dr. Rush in the foreground and Mr. Lyons in the background, at the time Dr. Rush caught his fish. [63]

Q. And the yacht, I think you called it the "Go-Gee"? A. The "Jo-Jay," yes.

Mr. Maguire: We offer them in evidence, your Honor.

Mr. Kriesien: Let me see them. We have no objection.

The Court: They may be received in evidence.

(Whereupon, three photographs marked Plaintiff's Exhibits Nos. 9, 10 and 11 were offered and received in evidence.)

Mr. Maguire: That's all. We will withdraw him temporarily as the expert testimony and get the full story about this situation later from the witness.

Mr. Beebe: If your Honor please, we will call Dr. Christen, please. May I have, at this time, these marked as exhibits?

The Clerk: Plaintiff's Exhibits 13 and 14 for identification.

(Whereupon, documents were marked by the clerk as Plaintiff's Exhibits 13 and 14 for identification.)

Mr. Beebe: May the Court please, at this time the plaintiff offers in evidence Exhibit No. 12 for identification which is a photostatic copy of the report of the inquest in Spanish.

The Court: Let it be received.

Mr. Beebe: Together with a translation which shall be displayed to counsel, and which is Exhibit No. 13 for identification.

Mr. Kriesien: No objection.

The Court: It will be received.

Mr. Beebe: And Exhibit No. 14 for identification, which is a transcription in the Spanish of Mr. Kriesien's cross-examination [64] of Dr. Serrano, one of the Mexican doctors, together with a translation attached thereto, which Mr. Kriesien, counsel for the defendant, has extended to us.

Mr. Kriesien: No objection.

The Court: It will be received.

(Whereupon, Plaintiff's Exhibits Nos. 12, 13 and 14 were offered and received in evidence.)

Mr. Beebe: Has the witness been sworn? [65]

DR. JOSE J. CHRISTEN

was thereupon produced as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Beebe:

Q. Will you state your name, please, Doctor?

A. Jose J. Christen/Y/Florencia.

Q. How old are you?

A. I am twenty-seven years old.

Q. And what has been your education?

A. After I finished high school, I took two years of college in the University of Mexico, and then I

(Testimony of Dr. Jose J. Christen.)

had six years of medical training in the University of Mexico. The full name of the university is——

Q. Well, Doctor, it has already been written on this piece of paper and so that it is correct, we will give it to the reporter and he can take it off. (Universidad Nacional Autonoma de Mexico.) And what degree did you get at the University of Mexico City?

A. Physician and surgeon.

Q. Doctor of medicine and surgery?

A. M.D., corresponds to M.D.

Q. I see. And after your graduation from medical school, did you do an internship?

A. We are required to do internship prior to your graduation out, [66] so I had one internship in Mexico General Hospital, Mexico City, and then I thought I wanted to have more training and I came to the United States as an exchange visitor. I went to Iowa, and I was at the Iowa Lutheran Hospital in Des Moines, and I took a regular rotating internship. After that, I went to Phoenix for surgical training. I trained in St. Joseph's Hospital in Phoenix, Arizona, took first year of surgical residency, and then I made up my mind about pathology and Dr. Lehman was so kind as to take me in his laboratory in the Good Samaritan Hospital here in Portland.

Q. And when was that?

A. I started on October 1st.

Q. Of this year? A. Of this year.

Q. 1955, and you are associated with Dr. Lehman?

(Testimony of Dr. Jose J. Christen.)

A. I wouldn't say associated, I am under his supervision.

Q. I see. May I have the Spanish document that I just introduced in evidence—that was too—may I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Beebe): Doctor, I hand you a photostatic copy of a report of inquest which was conducted in Mexico, and I wish to refer you to the portion beginning "Dictamen emitido por los Peritos." Do you see where I am?

A. Yes. [67]

Q. Now, Doctor, at our request—that is Mr. Maguire's and mine last evening, long about 10 o'clock, did you examine this document and start to work on a translation on that immediately?

A. Yes. I examined the document and I wrote a translation of the part that corresponded to the physician's—or what they say—I don't know what would be the straight wording——

Q. An autopsy report?

A. It is not quite an autopsy report. In Mexico, it is called "the lifting of a cadaver," raising it. The physician is asked to go and to examine the cadaver inside where it is. No one should have touched it and find anything that is surrounding it or corresponding to the death, and then he is authorized to take it over to the morgue or any place where the autopsy can be performed, and then the autopsy report and the conclusion which would be the diagnosis.

(Testimony of Dr. Jose J. Christen.)

Q. I see. A. So, that's what I translated.

Q. That's what you translated? A. Yes.

Q. Now, when you translated it, Doctor, for the Court, will you read it in English, that portion that you have?

A. I quoted it down—I could—can try to translate it from memory without the written part, or I could read my translation anyway.

Q. Well, will you read your translation? [68]

A. I have it here.

Mr. Maguire: May I suggest, for clarification, if the witness can translate one sentence at a time in Spanish and then give it in English.

The Witness: O.K.

The Court: Well, I will tell you what I'd like to do, I would like to take a copy of the Spanish and follow the doctor as he translates.

Mr. Beebe: Fine, I have another one here, your Honor, so you won't have to get down.

The Witness: Well, he could read the report to me and I could tell him the translation.

Mr. Beebe: Would that be satisfactory to your Honor or should I hand him this other one?

The Court: All right. Where do you want to start reading?

The Witness: Where it says "Habiendo sido——"

The Court: "Habiendo sido solicitados por el." What does that mean there? Translate as much as I have read.

The Witness: "Having been asked by the prosecutor of the town as auxiliary coroners"—I thought

(Testimony of Dr. Jose J. Christen.)

that was the translation, I don't know the American legal term—but these are the authorized physicians to go and check the cadaver, as I referred before, and they are not the nominees, but they are auxiliary. I mean it's not quite the ones that had the title, but they were auxiliary coroners. The underwritten proceeded to the place [69] called Los Llanos at 10 a.m. on February 15, 1953, on the Cape of San Lucas."

The Court: On the 10th——

The Witness: "On the 10th of February to Los Llanos on the Cape of San Lucas, to inspect the cadaver of an individual of American citizenship."

The Court: Now, did——

The Witness: "To run on an individual——

The Court: Of American nationality?

The Witness: Of American citizenship. Nationality doesn't quite give the same idea.

The Court: I know, it is used in Spanish to indicate a citizen?

The Witness: Yes. It's an impersonal term which is difficult to translate in English. And then I used the past tense and says, "When we removed to the above-mentioned place a cadaver" and there is where you stopped.

Mr. Kriesien: If the Court please, we have a certified copy in typewriting of the original.

Mr. Maguire: I think it may be a little easier for your Honor to read.

The Court: Let's see. Where were we now?

The Witness: "En la que se——

(Testimony of Dr. Jose J. Christen.)

The Court: What line is that on your page?

The Witness: Well, eight from the dictamen.

The Court: Well, this is going to be a long and painful process, gentlemen, now I can understand this and I am willing to accept the doctor's translation of this. The best I can see from the way it is, his translation is correct, if you are willing to accept that.

Mr. Kriesien: I am going to accept that, if I can refer to the translation later.

Mr. Beebe: We will accept that.

The Court: Then I will let the record show that I will go over the translation and compare it with the original if it is satisfactory to counsel.

Mr. Beebe: That is satisfactory.

Mr. Kriesien: That is satisfactory.

The Court: I want to take a recess for about twenty-five minutes, there is a gentleman, a friend of mine that came in. The Court is in recess.

(A short recess was taken.)

The Court: Proceed.

Mr. Beebe: May I have this marked? Dr. Christen, you handed me the written translation which you have made and it has now been marked Exhibit No. 15 for identification, is that the written translation that you have made? A. Yes, this is it.

(Whereupon, a document was marked by the clerk as Plaintiff's Exhibit No. 15 for identification.) [71]

Mr. Beebe: We offer it in evidence, if the Court please.

The Court: All right.

(Whereupon, Plaintiff's Exhibit No. 15 was offered and received in evidence.)

Q. (By Mr. Beebe): Now, Doctor, I hand you Plaintiff's Exhibit No. 14 in evidence and ask you to give a translation of that. That is the interrogation, your Honor, of Dr. Serrano by Mr. Kriesien and the answers which he gave.

A. It says, with a Roman number here, in our translation we found the part—it didn't say part—but it should say it concerning—that says, then in quotation marks "congested lungs and they were cut sections, a black liquid blood seeped; the superior and inferior lobes of the left lung were," and then an undistinguishable word——

The Court: May I inquire, Doctor, did you not make that translation?

The Witness: This is not a translation.

The Court: You mean you are translating it at sight?

The Witness: At sight, yes.

The Court: All right.

The Witness: And a word that has no meaning in Spanish, and then as if someone were asking it, "is this the correct translation," and then it says, "Yes," but it is obvious that someone made a mistake there, instead of what they should say "funcionados," so they probably asked him the right question. I remember in [72] the original document

(Testimony of Dr. Jose J. Christen.)

that it says, “funcionados,”—I mean—it is not a good word.

The Court: Well, we are not here to criticize the use of the word, Doctor, we are just trying to get as literal a translation as we can.

The Witness: I mean not as good, but I mean—I am criticizing the spelling—it is not spelled right.

The Court: I can see that.

Q. (By Mr. Beebe): What did you think the word should be and what did you think that means “funcionados”?

A. I think it means fused together, meaning one single entity.

The Court: A fusion, in other words?

Mr. Beebe: Of the lobe of the lung?

The Court: I think it is obvious that’s what the word means because the manner in which it is spelled here.

The Witness: In the two documents, they have different opinions, and the two—when I answer “Yes,” I don’t think that anybody can just use this word for anything in Spanish. It doesn’t exist in Spanish, because I thought—or I think it must be a typographical error, and does this mean there was no congestion of the left lung and the answer “Yes.” There was in some part of the thing they said that both lungs were congested so it is only natural they answered they were congested. This is exactly the word mentioned over there and “funcionado” means that it is made in only one part, and I still say this is not [73] the right word and it should say “fun-

(Testimony of Dr. Jose J. Christen.)

cionados." Maybe their region they used, but they do accept that it—the fact was that it would make it one part, with this word they are making that—they are making just one entity, the lungs were in one entity, so at——

The Court: All right, let's go on to the next section.

The Witness: "Was there any evidence of anti-mortum clotting or embolus in the pulmonary artery," and they say, "No" and then second—in our—this is not right—in our translation the pericardium is thickened with adhesions to the diaphragm and is that correct, and they say, "Yes." Then "Was the heart free from the pericardium in the pericardim" and they answer, "Yes." Then "Was there any adhesion to the wall of the heart," and they say, "No." This is confirmatory of the one part. "Was there any evidence of pericarditis in the wall of the heart?" They answer, "No, the evidence of pericarditis was the thickened pericardium and the adhesion to the diaphragm."

The Court: I agree with you so far.

The Witness: Thickened pericardium means or had the meaning of an increase in the normal pericardium and they say, "Yes," so the pericardium was thickened, the pericardic liquid was increased, "Was this a normal aspect or was it purulent?" Answer: "It was cirrhosis, which corresponded pretty close, and it was not turbid like in acute pericarditis, as it would be in acute pericarditis, but it was transparent. Then third, [74] in our translation it says the "aortic sigmoid valve in English

(Testimony of Dr. Jose J. Christen.)

are called the semicircular or semilunar valves and were thickened and hardened.”

The Court: Engrossed?

The Witness: That means they were—that they were thickened and hardened with atheromatous plaques. Is this a correct translation? And they say, “Yes.” And we found that there was hypertrophy of the left ventricle and then fourth, coronary arteries. Our translations were dissected and atheromatic plaques were found.

The Court: Literally, it means encountered atheromatic plaques.

The Witness: After the time they did that, they said, “Is this translation correct?” and they say, “Yes.” What is the meaning of “los cuales”? And they mean which this is a little screwed up because if I don’t know English and someone asks what is “los cuales,” I would have a lot of trouble. I would tell you in Spanish.

The Court: Well, that is when they answered, they said, “Which?”

The Witness: But this has nothing to do with the medical——

The Court: What coronary artery——

The Witness: What coronary artery was diminished. The anterior and posterior coronary arteries. In Mexico, we call it the anterior near the left coronaries and posterior near the [75] right coronaries. That was not in English. “Which was the diminishment in the diameter? Impossible to answer.” They didn’t know. I mean—they—I don’t know—they just couldn’t answer it—then five, in our translation

(Testimony of Dr. Jose J. Christen.)

relative to the biliary stone or gallstones. "Abdomen, liver red dark increased in weight and size, hardened or resistant to the cut section."

The Court: In other words, you mean he had a hardened liver; it was difficult to dissect?

The Witness: Yes. "Gall bladder full of green dark bile in approximate amount of 40 c.c. He has two gallstones. One of one centimeter and the other one of three millimeters in diameter. Is this the correct translation?" and the answer is "No."

The Court: It is the following—

The Witness: It is the following. The gall bladder was full of green dark bile in an approximate amount of 40 c.c. containing two gallstones, one of one centimeter in diameter lodged in the union of the cystic canal with the common bile duct, what we call the common bile duct, and also one smaller of three millimeters in diameter in the fundus of the gall bladder. Both were free. Five, our—

Mr. Beebe: That's the English translation?

The Court: I want to say for the record, that the doctor's translation appears to me to be an adequate one and a correct one, if you gentlemen are willing to accept that. [76]

Mr. Kriesien: We are, you understand. We have not had an opportunity to examine the translation, the other feature of it.

The Court: Subject to any corrections that you care to make, gentlemen, if it is determined that such corrections are to be made.

Mr. Beebe: You may cross-examine.

(Testimony of Dr. Jose J. Christen.)

Cross-Examination

By Mr. Kriesien:

Q. May I have No. 15? That is the doctor's translation.

(Document is handed to counsel.)

Q. (By Mr. Kriesien): Doctor, did you have occasion to examine a translation of the Mexican autopsy performed by John W. Wilson and compare that with your translation?

A. Not in total.

Q. With reference to the autopsy?

A. Yes.

Q. Or investigation by the doctors?

A. Yes.

Q. I have not had an opportunity to go into it, in detail, but were there any variances in any material aspects between your translation and that of Dr. Wilson?

A. At the time I examined it, I had not made my written translation, but I noticed some differences in what I would say and what the translation said, so you could find some differences, yes.

Q. But not in any material aspect? [77]

A. I beg your pardon?

Mr. Beebe: If the Court please, the witness does not know what the issues are in this case, and so to ask him whether it would be different materially, I don't think it is competent.

(Testimony of Dr. Jose J. Christen.)

The Court: Well, I think I will allow the question. I can realize how one translator of a particular document might use an entirely different expression which would amount to the same thing, but which would be different language. It wouldn't change the substance of it, whatever that is. I think this is the way of getting it.

Mr. Kriesien: I am asking if it is different, and the doctor practically admitted that the spelling is erroneous in some particular, and I would like to get this cleared up. This is Plaintiff's Exhibit 13, which is the translation performed by Mr. Wilson.

(Document handed to witness.)

Mr. Kriesien: On page 16.

Mr. Beebe: Shouldn't he also have the Spanish——

Mr. Kriesien: I am going to compare the English translation on page 16. Let us go down to the part about the heart, after upper and lower left pulmonary lobes were functional. That would be the 13th line from the bottom.

The Witness: Yes. The upper and lower left pulmonary lobes were functional. This must be "were fused."

Q. (By Mr. Kriesien): All right. You have in your translation [78] "the semicircular valves of the aorta were thickened and hardned with atheromatic deposits." Now, is that semicircular or semilunar valve?

(Testimony of Dr. Jose J. Christen.)

A. That is no difference anatomically.

Q. I see.

A. In Spanish, that is "sigmoid."

Q. You use the word "mitral valve," is that the same as the left you use in your translation of it, "mitral valve slightly hypertrophied, the left auricular ring slightly dilated"?

A. Yes, it corresponds anatomically to the same thing. I wanted to—it says here "of the aortical"—it should say "aortic."

Q. I see. I believe that is all, your Honor, there is no variance between the two translations, I can see, that are material.

Redirect-Examination

By Mr. Beebe:

Q. On this question, Doctor, of the word "functional," that appears in this translation, is that the same one that you said probably was a typographical error, and should be fused, made one?

A. In the paper I just read, I don't remember the numbers you put for them, in that paper the Judge read for me, that's the discussion of that word before——

The Court: Well, the word used in one of the Spanish papers there, is absolutely meaningless in Spanish. It either intended to mean functioned or functional or fused, one or the other, but [79] it's obviously a typographical mistake.

Mr. Kriesien: I am just wondering, your Honor,

(Testimony of Dr. Jose J. Christen.)

whether the same error prevailed in the autopsy report or in the supplemental report.

Mr. Beebe: Yes, it did. This translation that we offer says that the superior and inferior left lung lobes are functional, and the translator said "fused." So it apparently means that they were fused, and it was a typographical error; is that right, Doctor?

The Witness: Yes.

Mr. Beebe: Thank you, Doctor.

Mr. Maguire: Last night, Doctor, when we were going over it, you came to one word which you said, and I think it was with regard to one—the word in Spanish was given, it means striated, and you said that was an erroneous translation in it?

Mr. Beebe: The word, that Spanish word was "felatado," and you thought that there had been a typographical error, that the typist had made a mistake, and it should be "dilatados."

The Witness: Yes.

Mr. Beebe: In your translation, which meant dilated?

The Witness: I put the one for dilated. I thought that that word is never used in medical terms to design something in the heart of that kind.

The Court: What was the word?

The Witness: Filatado. [80]

The Court: It would be meaningless.

The Witness: It could be ragged, something like ragged, but in their—I think in the papers, I

(Testimony of Dr. Jose J. Christen.)

show somewhere else that the word "filatado" is suppressed entirely.

Mr. Beebe: In the later paper, the second one you read, it said "dilated"?

The Witness: Yes.

Q. (By Mr. Beebe): And so that you believe that the original Spanish word "filatado" was a typographical error?

A. Dilitado, which is dilated, and in this translation, the translator assumed that it was dilated, because it is such an odd word in Spanish that he recognized that there was an error. I can see—the auricular ventricular ring slightly dilated. So the other one, I think, could be pretty well forgotten.

Q. He made the same correction that you did because of the fact that it didn't have any meaning, the "filatado"?

A. Yes, he made the same correction.

Mr. Beebe: That's all, your Honor.

Mr. Kriesien: Nothing further.

The Court: You may be excused, Doctor, thank you.

(Witness excused.)

Mr. Beebe: Call Dr. Lehman. [81]

DR. WILLIAM LEWIS LEHMAN

was thereupon produced as a witness for and on behalf of the plaintiff and, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Beebe:

Q. Will you state your name, please, Doctor?

A. William Lewis Lehman.

Q. Are you a duly licensed and practicing physician and surgeon in the State of Oregon?

A. Yes, I am.

Q. And do you have a specialty?

A. Pathology.

Q. Doctor, would you describe for the Court your educational qualifications?

A. I graduated from the University of Minnesota in 1938 and the Bachelor of Medicine. I made the regular rotating internship duly recognized. I received a Doctor of Medicine degree, following which I practiced internal medicine in North Dakota, following which I spent a year in pathology in the University of Minnesota, graduated, following which I spent a year in the pathology department as an instructor at the Fort Wayne University Medical School in Detroit, following which I spent four years in the Navy as a pathologist. Then I spent two years as a fellow instructor in pathology in the pathological department at Columbia University at New York City, following that time, I have come here to practice pathology as a director at [82] Good Samaritan Hospital.

(Testimony of Dr. William Lewis Lehman.)

Q. Doctor, are you a lecturer or teacher and the head of the department of pathology?

A. I have had an appointment at the medical school, my appointment is now in effect.

Q. Have you, at any time, done teaching elsewhere?

A. Oh, yes. I taught at the University of Minnesota in the department of pathology and in the pathology department at Duane University and those of New York were all of a teaching nature.

Q. And do you, Doctor, hold a certificate as a specialist in pathology, or is there such a thing?

A. Yes, I have what is called a board—I mean a diplomate in pathology in both clinical and anatomical fields.

Q. Dr. Lehman, have you had an opportunity to view the translation of the Mexican autopsy prepared by Mr. Wilson in which Dr. Christen testified to on the stand?

A. I have seen one translation. I have not seen the translation Dr. Christen made last evening after he left me.

Q. You have seen the one which is in Exhibit No. 13 in evidence, have you not, Doctor?

A. Yes.

Q. Now, I will hand you Exhibit No. 15 in evidence, which is the translation of Dr. Christen and ask you to read that, if you will, please, to familiarize yourself with it.

A. You want me to do it out loud, Mr. [3] Beebe?

(Testimony of Dr. William Lewis Lehman.)

Q. No, just read it so that you are familiar with it.

A. This is in essence, essentially as much as we discussed last evening.

Q. And except for the matters that were discussed on the stand, essentially the same as the Wilson translation? A. Yes.

Q. Now, Doctor, were you engaged to attempt the autopsy upon the body of James Lyons?

A. Yes, I was.

Q. Where did you go to attempt to perform that autopsy? A. In Coos Bay, Oregon.

Q. And were you able to perform such an examination?

A. Only a very sketchy one, inasmuch as the remains had already been autopsied and the important viscera had not been returned to the deceased.

Q. Now, what did your examination consist of, what did you find?

A. Well, I examined the remains as carefully as I could under the circumstances, upon arriving in Mill's Funeral Home in Coos Bay. We found that the body had been sealed in a metal container and around it, set on the top, there were boards closing the metal container, which I was told was necessary for the transport of the body. The roof of the metal container was soldered and with a small acetylene torch we removed it and found that the body had been totally wrapped in clean white cotton which was thoroughly formalin soaked, and we removed the cotton and then [84] inspected

(Testimony of Dr. William Lewis Lehman.)

the body as closely as possible. It was then that we noticed the viscera of the thorax and the abdomen were absent and had been replaced by a similar clean white formalin soaked cotton again. Only a few small organs remained and they were, namely, the bladder; prostate gland, and a portion of the terminal rectum. In examining the cranial cavity, we found that it, too, had been opened by the physician and the top of the bony part of the head had been replaced but prior to this, the brain had been replaced with cotton, again which was thoroughly soaked with formalin. So my examination was limited chiefly to what one might say was an inspection of the body.

The Court: May I, just as a matter of inquiry, Doctor, what useful purpose could be served by removal of the brain in a situation of this kind?

The Witness: Any autopsy examination to be complete, your Honor, must include an examination of the brain, and I presume that these Mexican physicians attempted to discern the presence or absence of any disorder which might have precipitated this man's death.

Q. (By Mr. Beebe): What did you find then upon your examination?

A. The chief findings, those that represented the deviations from normal were abrasions or what I interpreted with the knowledge I had at the time as powder marks which were found on the posterior surface of the body, the back so to speak, in the

(Testimony of Dr. William Lewis Lehman.)

area generally called the wings of the back, and I found some on [85] either cheek and one in particular close to the lid margin on the right and another or possibly two on the right ear, that was all.

Q. Did you find any powder marks on the tip of the shoulder? A. Yes, there was some.

Q. I beg your pardon?

A. These linear abrasions were several centimeters—they appeared to be several centimeters long and they were raised two or three millimeters, but it was, they represented tracks of some traumatic agent, let us put it that way, these raised welts were colored blue and their tracks were generally upward and outward toward the scapula and the shoulders and the cheeks and the ear.

Q. Now, Doctor, have you, in your experiences, performed a large number of autopsies upon men around forty-nine years of age; between thirty and fifty; men in that age group?

A. I have performed a good many autopsies of people of all age groups, yes, sir, men and women.

Q. But your experience with men, have you had considerable experience with men in that age group?

A. I would say that it was considerable, yes.

Q. Now, in conducting those autopsies upon men who have died from all kinds of causes, have you had occasion to examine the coronary arteries and the arteries of men in that age group?

A. Yes, an autopsy precludes avoiding the heart. It is an [86] important or can be an important part and it is a part of every autopsy, and naturally the

(Testimony of Dr. William Lewis Lehman.)

arteries are a routine part of the examination of this organ.

Q. Now, what percentage, could you say, of men in that group, show atheromatic deposits in the arteries and on the semilunar valves together with stiffening of the aorta?

A. This is a difficult question to answer in this respect, that by saying is there or is there not an atheromatous change, one's criteria to the presence or absence may vary from examiner to examiner. One man might say, "I wouldn't call this as hardening of the arteries unless there is a considerable degree." Another man may say, "I will feel that anything which is a deviation from the norm is a hardening of the artery," but any man near the age of fifty, let me say it this way, almost every individual around the age of forty-nine or fifty will have some arteriosclerosis. Some arteriosclerosis may involve the heart valve. I mean, it is not concentrated there, but it is found in greater degrees elsewhere in the arterial system. Arteriosclerosis is an aging wear and tear process and by the time fifty comes I think most of us already have some such change.

Q. Would it be fair to say then, that the complete absence of sclerosis in the arterial system would be the exception rather than the rule in men of that age group?

A. If you could put it not quite so strongly, I think I would go along with that, because every once in a while we do encounter [87] people even

(Testimony of Dr. William Lewis Lehman.)

older than that who have no arteriosclerosis at all, but that is the exception, to be sure.

Q. That is the exception? A. Yes.

Q. Now, Doctor, when an autopsy surgeon reports that he has found atheromatic deposits and that the coronary arteries are diminished in caliber, but cannot say how much, can you tell from that how much arteriosclerosis or atheromatic deposits there was from the reports?

A. No, because as I have just previously mentioned, the criteria of one individual and another varies. One might say considerable amount means 50 per cent loss of the caliber. Another man seeing the same change might say there is, say, well, there is only a moderate degree, so that such a description is not as accurate as it might be and it would have been better, had the examiner actually attempted to estimate the percentage, loss of lumen of these vessels.

Q. What do you mean by the "lumen"?

A. The lumen is the openings in the pipe.

Q. I see. The amount of caliber loss?

A. A one-inch pipe is a one-inch pipe, and a one-inch lumen is the same thing.

Q. In the Mexican autopsy there is nothing to indicate the degree of decrease in the lumen; is that correct?

A. It is. There is no specific indication. It is their impression [88] of the degree of caliber loss through diminishment by the presence of atheromatic deposits.

(Testimony of Dr. William Lewis Lehman.)

Q. Now, Doctor, with respect to the stiffening of the aortic semilunar valves, with some atheromatic deposits, is that a condition that you customarily find in autopsies of men between forty and fifty, who have died of other causes, other than some heart causes?

A. Once again, counselor, if you could make it not so strong, yes, but it is not an uncommon occurrence at all in men of his age.

Q. And now, Doctor, if a man had died of an acute aortic insufficiency, as the Mexicans found, would you have expected to find an enlargement or dilation of the aortic ring?

A. Yes. By the very definition of the conditions one would expect to find a ring of increased size.

Q. So, does the Mexican autopsy show that there was any enlargement found on the autopsy of the aortic ring?

A. There is no mention made of the diameter of the aortic ring, so that from that interpretation here, one cannot say that there was any increase or decrease in the circumference of the aortic valve system.

Q. Doctor, could you observe that they did find a dilation of the mitral valve?

A. That is—there is a reference to it as a dilatation or dilation of the mitral valve, it is mentioned, but the degree [89] here is not mentioned, nor is there any mention of the circumference of this valve ring.

(Testimony of Dr. William Lewis Lehman.)

Q. So then they apparently discovered some dilatation of the mitral valve ring, but they found no dilatation of the aortic valve; is that correct?

A. My interpretation of the autopsy protocol is such.

Q. Doctor, if you were to examine and find no dilation of the aortic ring, could you bring a conclusion of the death from acute aortic insufficiency which produced a sudden heart failure?

A. Such a conclusion is not very likely. Now, I don't see how one can. In an aortic insufficiency, one usually would have described an enlargement of the ring.

Q. In your opinion, then, Doctor, do the factual premises that the Mexican doctors found on their autopsy support the conclusion to the conclusion that the death occurred due to an acute aortic insufficiency?

A. No, they do not.

Mr. Beebe: May I have just a moment, your Honor?

The Court: Very well.

Q. (By Mr. Beebe): Doctor, in your experiences, have you ever performed an autopsy upon a man who died of aortic valve disease where there was not a history of heart murmurs?

A. That is perhaps a difficult and perhaps even an unfair question to answer for this reason. In today's hospitals, where there is a shortage of interns to fill the hospital needs and to [90] make proper physical examinations, and take proper histories, there is an occasional occurrence where an

(Testimony of Dr. William Lewis Lehman.)

individual, dying of heart disease of valvular lesions, as you pointed out, reaches the autopsy people without such a notation on the history, and therefore in that way, I must say I have posted people in which there have been no sufficient history, but on the other hand it is difficult for me to envision or to reason the likelihood of the absence of any from my stand at the autopsy table, to envision or figure the likelihood of the absence of any physical signs wherein a severe valvular lesion was actually present.

Q. Well, Doctor, if a man had been examined by a competent and experienced doctor, specializing in internal medicine, and had exercise tolerance tests and no murmurs were present, would you say under those circumstances that a death from aortic valvular heart disease would result?

A. Assuming that the individual had a severe enough aortic valvular lesion, and assuming that the internist, the man examining the patient, was a careful examiner, and assume that his exercise tests were carefully conducted, I would say this, under those circumstances, a man with a severe heart lesion would present some findings to the examiner.

Q. It would be a murmur?

A. If not a murmur, a thrill or a pulse of some sort.

Mr. Maguire: What do you mean by "thrill"?

A. A thrill in some of those heart lesions the changes are so [91] severe and so strong that merely placing the hand upon the chest will produce to the

(Testimony of Dr. William Lewis Lehman.)

internist, a thrill or a little shaking, a little beating, so to speak, of the tissues overlying the heart.

Q. (By Mr. Beebe): Now, Doctor, I want to question you a little more about atheromatic plaques or deposits if I might. Would this diagram (indicating) help you in explaining about those?

A. Yes.

Mr. Beebe: May I have this marked?

(Whereupon, a chart of the heart was marked Plaintiff's Exhibit 16 for identification.)

Mr. Beebe: Now, I think I can put this where your Honor can see that.

The Court: I can see it fine.

Q. (By Mr. Beebe): Doctor, I wonder if you would step down and bring a pencil. You might number this No. 1, No. 2 and No. 3 and No. 4 and No. 5. Now, Doctor, referring to this diagram of No. 1 there, would that be a section of an artery?

A. Yes; this is strictly diagramatic representation of a blood vessel, which I am sure in this case, counsel intended to represent a coronary artery which is the one supplying blood vessels to the heart. The inner dark line would represent the inner single cell layer which provides a smooth surface, over which the blood flows. The inner line, so to speak, of the blood vessel underneath which is a small protective layer, and outside of which is muscular coating which covers this vessel and gives [92] its insulation, and then, not really shown, is a still further peripheral layer of connective tissue which covers

(Testimony of Dr. William Lewis Lehman.)

this whole structure. All of this is preamble to the small yellow area, which is intended here, I am sure, to indicate one of the early changes of heart diminishment which is found immediately under the inner lining and not involving the muscular coat and is present as a small collection of fluid and perhaps beginning fibrous tissue is the earliest changes in what might be considered concerning the function of the arteries.

Q. Now, for your purposes, you have used the arteriosclerosis, and we have been talking about atheromatic deposits. Now, will you describe the correlation of those two?

A. Arteriosclerosis means any disease of the blood vessels. Atherosclerosis is a part of arteriosclerosis in which there is a typical change in it. This type usually is indicated by the depositing or laying down of cholesterol, a fatty deposit, which gives an atheromatous change to the disease, therefore the atheromatous plaques in the arteriosclerosis.

Q. Now, Doctor, referring to figure two; what does that indicate?

A. Figure two, I would interpret to mean a more advanced form of number one. This is how the thing grows. This small area of edema, and the fibrous tissue deposition soon becomes yellow dormant deposits of cholesterol, and [93] now beginning to restrict more the opening of the lumen in that artery, and perhaps begins to encroach on the muscular coating.

(Testimony of Dr. William Lewis Lehman.)

Q. Now then, referring to number three, is that a picture of the situation after the deposit has grown even greater? A. Yes.

Q. Now, an autopsy surgeon finding any condition from one through three, how would he report that? Would he report atheromatic deposits?

A. Anyone looking for arteriosclerosis, and even after these indications would show that there was coronary arteriosclerosis, there was atherosclerosis in the coronary arteries, so that the description may mean anything from this state to stages much worse.

Q. Now then, how about number four; what is that situation?

A. Number four is once again a more advanced form of number three, only here now, the covering—of lining, they have caused back here has been eroded and ulcerated away and calcium, the material that forms may follow and so on is deposited here, and in the fibrin, one of the deposits of fluid is deposited there, so that this merely represents a severe form in which is now ulcerated stone, so to speak, atheromatous plaques, and the reduction in caliber.

Q. And is the reduction in caliber greater at that stage [94] than in three?

A. Oh, yes; but that is obvious, but this change, this calcification becomes greater, this nodule becomes enlarged.

Q. Now, Doctor, when it is advanced to the point where there is some calcification, is that apparent to the autopsy surgeon where there is calcification?

(Testimony of Dr. William Lewis Lehman.)

A. Oh, yes. One notes it really upon cutting it across with a knife. It grates, it does not cut.

Q. And would you say, that an autopsy surgeon in performing an autopsy, if he encountered that grating, would likely report a calcification, if he found it?

Mr. Kriesien: If the Court please, I object to Mr. Beebe asking this witness as to what another autopsy surgeon would or would not do.

The Court: Objection sustained.

Q. (By Mr. Beebe): Now then, Doctor, going along to number five, what does that picture there show?

A. This small red line (indicating) is what the physician calls a vasa vasorum, and these blood vessels themselves must have some nutrition, and these small blood vessels come from the inside, and they supply the wall of the blood vessel itself, because it too must have some sort of nutrition. Now, it is possible that in the development of an atheromatous plaque, that the destruction of the wall of the artery, the blood vessels may involve one of these nutritive vessels, [95] open it up, and permit a hemorrhage to occur, and the pathologist has the name that we sort of like to use for that, and he calls it coronary apoplexy, meaning hemorrhaging in the coronary artery, and usually it is into one of these calcium atheromatous plaques.

Q. Now, is that discoverable upon autopsy, that there is anything of that kind?

A. Yes, one doing a careful examination would

(Testimony of Dr. William Lewis Lehman.)

find that certain of the reddish material, dark red, perhaps, we call it friability, a good many use the word for the yolk of an egg, and may be fairly consistent, but it is meant to develop steadily.

Q. I believe you said on that situation there, there would or would not be the calcification that would result from the laying down of the solution, as I understand it?

A. Yes, but counselor, you must remember that calcification—the fact that it occurred in some as atheromatous plaques, may be completely absent in others and develop in other regions.

Q. I see. Thank you very much. If the Court please, we offer the Heart Exhibit Number 16 for identification.

Mr. Kriesien: I have no objection for the purpose of illustration.

The Court: It may be received for the purpose of [96] illustration.

(Heart Exhibit Number 16 received.)

Mr. Beebe: You may cross-examine.

The Court: I think, counsel, in view of the fact that I have a pre-trial conference set at four o'clock, and it is about four, you might defer until tommorrow morning?

Mr. Kriesien: That will be fine, sir.

The Court: And may I ask if it will be all right with counsel if we start at nine-thirty in the morning?

Mr. Kriesien: Yes.

(Testimony of Dr. William Lewis Lehman.)

Mr. Beebe: Yes.

The Court: Thank you. Court is adjourned.

(Whereupon, an adjournment was taken until 9:30 o'clock a.m. of the following day.)

(Pursuant to adjournment proceedings were resumed at 9:30 o'clock a.m., November 23, 1955.)

The Court: Proceed.

Mr. Beebe: May the Court please, I should like to ask Mr.—Dr. Lehman a few more questions on direct examination. Mr. Kriesien has not started on cross-examination.

DR. WILLIAM LEWIS LEHMAN

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Direct Examination (Continued)

By Mr. Beebe:

Q. Dr. Lehman, you mentioned some indurations or welts at the site of the powder burns?

A. Yes.

Q. If the man had died instantly, if his heart had stopped instantly, would those swellings have developed? A. No.

Q. What is the minimal amount of time that he would have had to live after the incrustations of the powder in order for the indurations to appear?

(Testimony of Dr. William Lewis Lehman.)

A. At an absolute minimum, this man should have lived at least eight to ten minutes, because these raised areas presumably from the shotgun blast were composed of swelling, and if a thing occurs and causes an induration, it indicates there must have been some circulation to produce the swelling [98] and the blood in these areas where he was injured.

Q. Now, Doctor, did this Mexican autopsy show any congestion of the lungs and liver?

A. According to the report, there was some congestion of the lungs and a mild or minimal amount in the liver.

Q. How long—what would be the minimal time that a man would have to live for that to develop?

A. Well, let me put it this way: If a man were to die suddenly, promptly, having been in good health, there would be no swelling of the liver, providing there is no additional or other disease producing this change. There would be no congestion in the lungs so that I would feel, it's my opinion, that a man would have to continue to exist, to live eight to ten minutes at a minimum, in order for congestive changes to form in the lungs and for blood to collect in the liver to indicate that it was congested.

Q. Would that indicate an abnormally fast rhythm of the heart for a short period of time?

A. I think you want me to understand that would such a situation develop if this man were living and his heart were irregular and/or had a

(Testimony of Dr. William Lewis Lehman.)

spasm, would this being within eight to ten minutes. Yes, it could.

Q. Could it develop in four to five minutes?

A. Well, it isn't as likely to develop. It is a hard decision to make. It's not likely to occur in that time.

Q. Would it be possible for that to occur with a very rapid, [99] irregular beat?

A. Well, it would be very difficult to detect in those few minutes.

Q. One more question, Doctor. Did I ask you if a death—the death of this man whose autopsy you have seen had occurred from a coronary thrombosis, would the examination of the arteries have revealed that? A. Yes.

Q. Does it reveal that?

A. According to the autopsy report?

Q. Yes.

A. No; there is no mention of a clotting, a thrombos, in the coronary circulation. There is only a report of atheromatous plates.

Mr. Beebe: You may inquire.

Mr. Kriesien: No cross-examination.

The Court: You may be excused, Doctor.

(Witness excused.)

Mr. Maguire: You may resume the stand, Mrs. Lyons. [100]

(Testimony of Jane S. Lyons.)

Q. Did you and he occupy the same bedroom?

A. Yes.

Q. Did he, on that occasion, complain of any pain of any kind? A. No.

Q. Did he rise during the night complaining of any discomfort?

A. No, to my knowledge he slept through the night.

Q. Now, when did you learn—first learn that he had gone down to Dr. McBride for examination or treatment, whatever it might have been?

A. The next morning, which would have been a Friday morning or Thursday morning, depending upon—I am just hazy on which day—at least it was the morning after he arrived home from the trip, I was going out to play golf and Jim said, “I am going down to see Dr. McBride.” I was rather under the impression that he had an appointment with him, so I said, “I will see you later,” and when he got back, he said, “I went in for a check-up,” which he often did, but not often did, but I mean, usually he was there once a year, [103] but I was under the impression that it was not anything out of the ordinary, so I didn’t question him any more about it. So it was the following day then, after the day before he left to go on the trip that he said that he had had this pain in his chest and had gone down to see Dr. McBride and see what was wrong, and so I said, “What did he tell you?” And he said, “Well, I have heart fatigue,” and I said, “Are you going to go on a trip, do you know what

(Testimony of Jane S. Lyons.)

that means?" And he said, "Yes, the doctor said it would be good for me to go and have a good time and relax," so that was the extent of it.

Q. By the way, did you learn at that time or before he left that he had any nitroglycerin pills?

A. Yes, I did, because that was what brought it to my attention.

Q. Well, I think you left that out.

A. Well, when we were sitting out on the patio, I noticed this in Jim's pocket, and I went over and, of course, as soon as I saw nitroglycerin, I said, "What are those for, are they for a heart condition?" And he laughed and he said, "Yes, I had this pain in my chest is why I went down to the doctor." And I said, "Is there anything wrong," and he said, "No, he termed it heart fatigue, and if I have any need of these, I want for you to have them along to take one." So that was, as I say, what brought it out of where he mentioned to me [104] that he had this pain in his chest, and why he had gone to see Dr. McBride.

Q. Did he tell you when he had the pain in his chest?

A. Yes, then he said it was the night he arrived home.

Q. Now, did he appear to be disturbed or despondent or melancholy or anything like that?

A. Oh, no. He was in very good spirits.

Q. By the way, perhaps I can avoid this, I understand we conceded this was not a question of any suicide?

(Testimony of Jane S. Lyons.)

Mr. Kriesien: That's right.

Q. (By Mr. Maguire): Mrs. Lyons, Jim was in a rather serious automobile accident some several years before; was he not?

A. Yes, he had been in an automobile accident.

Q. Now, were you there in Coos Bay?

A. No, I was in Palm Springs and Jim had gone up to the mill, and it was while he was up there in Coos Bay that the accident occurred.

Q. And did you immediately come up to Coos Bay?

A. I came up, I think it was the following—two days later.

Q. And did you know anything about the extent or the place where he was injured or how he was injured?

A. It was—I have forgotten—it was crushed ribs, is what seemed to be the general injuries and just generally banged up, but the rib injury was the thing that seemed to be the more serious part [105] of it.

Q. And did he suffer any injury to his nose?

A. Not at that—well, I mean about that, Mr. Maguire, he had broken his nose several different times, yes. He did. He developed a cut across his nose.

Q. Well, now, this—

A. But that wasn't at the time that he had the operation on his nose. He did have a cut across his nose.

Q. And I said previously—I believe you said he

(Testimony of Jane S. Lyons.)

was otherwise banged up? A. Yes.

Q. Who attended him on that occasion?

A. Dr. McKeown of Coos Bay.

Q. Now, this chest pain, the only chest pain you have told us about, is that the only one you ever knew about? A. Yes, it is.

Q. Do you know whether that occurred at night or whether it occurred in the morning; what did he tell you about that?

A. He said it occurred at night when he went in. Evidently it was my thought that when he first went to bed he felt tired and he had this pain in his chest, so he went to bed early.

Q. When he arose in the morning, did he make any complaint about it?

A. No, I was not aware of it at all.

Q. Now, after he got out of the hospital in Coos Bay, he [106] was brought back to the house; wasn't he, from the hospital? A. Yes.

Q. And remained there in Coos Bay for about how long? I appreciate the fact that you didn't keep a diary of it, but as close as you can recollect?

A. A week or ten days, maybe.

Q. And then where did he go?

A. And then we went down to Palm Springs.

Q. And while he was in Palm Springs, did he cough up any fluid from his lungs?

A. I don't remember that, whether he did or not.

Q. I mean, you don't remember whether that happened at any time after he got home?

A. No, I don't.

(Testimony of Jane S. Lyons.)

Q. All right, that's all right. Now, did he develop any pains or aches or untoward physical condition after he got down to Palm Springs?

A. Yes, he did.

Q. Will you tell the Court about that?

A. I believe it was the following day after we arrived, he said, "I don't feel good, and I think I should see the doctor," and so I called a local doctor.

Q. That was Dr. Feniman?

A. Dr. Feniman, and Dr. Feniman was not in town, so the office nurse asked if I would like to have a substitute doctor [107] from their clinic, and I said, "Yes, I would," so he came out and examined Jim, and at that time, as I remember—it's rather hard to know just what a doctor is trying to explain at times, but it was like a fluid from this injury where these ribs were crushed and so forth, that was brought about—whether it was aggravated, I don't know what, but there was a fluid condition there that it takes a certain length of time for that sort of thing to be absorbed and that was the condition.

Q. Was that doctor Dr. McBride?

A. Dr. McBride.

Q. And did Jim complain either then or as the matter developed about any pains, any place else in his body?

A. In his foot, his right foot, as I remember, but I am not sure which foot it was, but there did develop this painful condition in his foot.

Q. Well, were you, at that time, informed what that was?

(Testimony of Jane S. Lyons.)

A. Well, Dr. McBride was not sure, and when Dr. Feniman came back, he said, "I would like to have Dr. Feniman examine Mr. Lyons," and together they came to the house and both determined—called it a gouty arthritis, and I asked at that time what that was. I said, "Well, I always thought of the gout, but I had never heard of a gouty arthritis," so they explained to me that that type of—

Mr. Kriesien: If the Court please, I would like to [108] interpose an objection at this time. I think this is going pretty far under the realm of hearsay.

Mr. Maguire: Well, I thought you were interested in his previous condition, but if you are objecting, I will not proceed.

The Court: The objection is good, sustained.

Mr. Maguire: Very well, that will be all, Mrs. Lyons. Counsel may want to examine you.

Cross-Examination

By Mr. Kriesien:

Q. Mrs. Lyons, do I understand your testimony to be that Mr. Lyons did not inform you of this chest and arm pains until after you had found the nitroglycerin tablets in his pocket?

A. That's right.

Q. And he advised you at that time, that he had been informed by the doctor to go on this fishing trip?

A. That's right.

Q. Do you know how many times he saw the

(Testimony of Jane S. Lyons.)

doctor with reference to this pain in the chest, radiating down the arm?

Mr. Beebe: Well, just a minute, there hasn't been any testimony about radiating down the arm.

Q. (By Mr. Kriesien): Pain in the chest?

A. I am not sure on that. I believe, only the once, but he may have gone back a second time, and I just really don't [109] remember.

Q. And did Mr. Lyons take any of the nitroglycerin pills in your presence? A. No.

Q. Well, was Mr. Lyons one that would tell you about his complaints or did he rather keep things to himself along that line, Mrs. Lyons?

A. I would say he was more inclined to keep them to himself, but not to the extent of where I would—he would be what I would term foolish about it.

Q. Did he ever advise you in May of 1950 he had been to Dr. McKeown? A. No.

Q. Due to a condition of pain in his chest?

A. No.

Q. Did you ever have occasion to confer with Dr. McKeown about the condition of Mr. Lyons' health?

Mr. Maguire: Let me—you mean prior to his death?

Mr. Kriesien: Prior to his death, yes.

A. He was our family physician and I had, of course, talked with him at the time of the accident, but not about any—I mean, that would be hard to say, being our family physician and whatever came

(Testimony of Jane S. Lyons.)

up we always consulted with him, but as to a given time, I couldn't tell you.

Q. In December of 1952, had Mr. Lyons been seeing Dr. McBride [110] quite regularly?

A. December of '52, I don't know.

Q. You wouldn't know. I will ask you whether or not Mr. Lyons, when he told you about the pain in the chest, also said that he had pain in his arms?

A. No.

Q. Do you know whether or not Mr. Lyons saw Dr. McBride quite regularly while he was in Coos Bay?

A. No. I mean, I know he didn't see him regularly.

Q. He did not. Mrs. Lyons, did you have occasion to be in the woods a considerable amount with Mr. Lyons when he was going about his work, or did you more or less tend to the house?

A. I more or less tended to the house. I went in the woods often, but I was in the car. We would drive up to the camp and that sort of thing, but not during the time he would be working in the woods.

Mr. Kriesien: That's all, Mrs. Lyons.

Mr. Maguire: That's all.

The Court: You may be excused. Next witness.

(Witness excused.)

Mr. Maguire: Recall Dr. Chamberlain. [111]

DR. FRANCIS CHAMBERLAIN

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Maguire:

Q. Doctor, you are a duly admitted physician and surgeon in the State of California?

A. Yes, sir.

Q. Where did you receive your medical training?

A. I received my M.D. from the University of California Medical School in 1934, and do you want any more medical training?

Q. Yes, if you will.

A. I interned at Stanford University Hospital. I went back to the University of California Hospital for a year of assistant residence. I then went to Columbia University training as physician and surgeon in New York, where I had two years training as resident in cardiology in residence in medicine, and where I received the degree of doctor of medical science from Columbia University. Then I went to Boston to General Hospital to work with Dr. Paul White for two years, first as resident in cardiology and then as resident fellow in cardiology in Harvard Medical School. At the same time, I helped Dr. Paul White with his work.

Q. The Dr. Paul White, the physician who took care of [112] President Eisenhower?

A. Yes, sir.

(Testimony of Dr. Francis Chamberlain.)

Q. And—you may continue.

A. Then I returned to the University of California Medical School where I was put in charge of the Department of Cardiology and the Electrocardiograph Department in which position I continued for seven years, after which I withdrew from full-time work at the medical school to take up an office where my practice was restricted to consultation in cardiology in the afternoons and I continued to teach five mornings a week, alternate semesters as a professor at University of California Medical School, and in which role, I also give lectures, I give most of the lectures in the medical school on the subject of coronary heart disease and hypertensive heart disease.

Q. And are you still associated with the medical school?

A. Yes, sir, I am an associate clinical professor of medicine.

Q. And your professional life, outside of that, is in San Francisco, now? A. Yes, sir.

Q. And do you do any other kind of medical work, other than your private practice, other than in these relating to the heart and circulation?

A. No, sir, my work is entirely restricted to the heart. [113]

Q. Have you received any certification in any specialties from any of the American boards?

A. Yes, I have been certified as a specialist in internal medicine by the American board, and I

(Testimony of Dr. Francis Chamberlain.)

have also been certified as a specialist in the cardio-vascular disease by American board.

Q. Have you occupied any official positions in any of the medical associations or branches of the medical associations?

A. Yes, I have been president on three different occasions of the San Francisco Heart Association. I was president of the California Heart Association. I am on the board of directors of the American Heart Association, on the editorial board of the American Heart Journal, and I am one of a five-man national committee in charge of certification for cardio-vascular disease. A five-year term, five-man committee who has sole charge of the certification of men throughout the country in certification in the cardio-vascular disease.

Q. Well, does that board determine, before one may receive a certificate, does he go through a number of examinations and examinations of his record and what he knows about it or what experience he has had in cardio-vascular disease?

A. Yes, they have to show qualifications by having several years training under proper authorities. Then they have to pass a written examination, and then they have an oral examination which we supervise, which, incidentally, I have [114] to spend a day next week doing in Chicago.

Q. I see. I take it that in your studies and in your practice, you have had occasion to both know of the physical constitution of the heart which is free from any abnormality whatsoever, as well as

(Testimony of Dr. Francis Chamberlain.)

hearts which have been—have conditions which are not as good as that of the perfect heart?

A. Yes, sir. Most of the patients actually who come to a heart specialist have no heart disease, but have various manifestations that might make them think they have, so that actually, the majority of the patients we see, as new patients, who come for heart study don't have any heart disease.

Q. Well, what do you mean by that? Is it a psychopathic or mental condition or do they have some discomfort in the vicinity of the heart or chest?

A. Well, they have symptoms which make them feel that they have heart disease.

Q. What kind of symptoms are those generally? I don't want you to go——

A. You mean symptoms which make them think they have heart disease, but which are not concerned in heart disease?

Q. Yes, sir.

A. Awareness of the beating of the heart, irregularity of the pulse, and especially pain in the chest very often radiating down the arms, which come on as a pattern of fatigue. In other words, many of the people we see, when they get [115] tired, they have a chest ache that is commonly thought of as part of fatigue, and the person will get an ache, and they think that it is heart trouble and so they get a chest ache.

Q. Well, Doctor, will you explain to me why a person will have a pain in the chest or in the heart

(Testimony of Dr. Francis Chamberlain.)

or what he thinks is in the heart when it is merely a matter of fatigue, and when he—by the way, you use the term “fatigue,” does that include both mental and physical fatigue?

A. Yes. It would include mental and physical fatigue. Well, the exact mechanism whereby fatigue is transmitted to sensations of pain, is one we don't know all the answers about, but we see, every day, examples of this pain. If I were to take your arm, and say for you to hold it out this way for five minutes, you have a great deal of pain and aching in your arm and will have exactly what will be the symptom of fatigue pain, and in some similar way, these individuals that we see, when they get tired, develop those pains, especially in their chest and their arms. Many themes have been written where some liken it to the feeling—to the comparison of the old Chinese water torture, where a drop of water dropping on the skin would produce or get the skin so highly sensitive that each drop would make the prisoner feel as though he—as would produce great agony and the heart pumps against certain sensitive parts of the chest in a similar manner, and some feel that this thump, thump, thumping of the heart against [116] a sensitive part of the chest, by virtue of the fact that they are aware of it. That is rather crude, compared to the highly sensitive nature of the skin and can produce those sensations of pain, but, of course, a great part of our time is spent separating these symptoms, these symptoms from true heart disease as compared to

(Testimony of Dr. Francis Chamberlain.)

the symptoms of fatigue, and there are various manifestations of each, which separate them in a very satisfactory manner, because all the symptoms all differ. The symptoms, in other words, of fatigue differ from the symptoms of coronary pain very strikingly, which an expert, of which actually, second- or third-year medical students are taught to make the differentiation of.

Q. Well, before I go any further on this matter, it just occurs to me that I have omitted to have you tell us about the factual situation with respect to this fishing trip and what happened there at the time that Mr. Lyons came on his death. Had you known Mr. Lyons prior to this trip?

A. No, I had never met Mr. Lyons, nor had heard of him prior to the time this fishing trip was arranged.

Q. You did know Mr. Irwin, did you not?

A. I knew Mr. Irwin and had acted as his physician when he was in San Francisco. I was his guest.

Q. Now, the other members. The members of the party, besides yourself and Mr. Lyons, was Dr.—a doctor from Portland?

A. Dr. Homer P. Rush of Portland, yes, [117] sir.

Q. Do you know what his specialty is? Well, he can tell about himself, and where did you join the yacht and who went with you?

A. Dr. Rush and I met in San Francisco, and flew a commercial plane down to San Diego, where we were met by Mr. Irwin's pilot and plane and we

(Testimony of Dr. Francis Chamberlain.)

flew down to La Paz. Mr. Lyons and Dr. Rush and I flew in this plane to La Paz where Mr. Irwin was waiting with the boat.

Q. That's the——

A. The Jo Jay which we saw in the movie, yes.

Q. Now, where is La Paz, on the Southern California peninsula?

A. Yes, La Paz is in the bay of Lower California about 300 miles north of the southern tip of the peninsula on the bay side.

Q. And did anything of moment happen in coming down, or as you were flying to La Paz—did anything happen that would be important to the Court?

A. No, we flew at about 7,000 feet elevation. It was a very pleasant, beautiful trip. There was nothing startling.

Q. Did Mr. Lyons give any indication of distress? Cyanosis or being out of breath when you were up in an elevation that high?

A. Not at all.

Q. About what was his general physical appearance? You might describe him and his physical description to the Court? [118]

A. Yes, he appeared quite healthy and he was obviously an energetic and attractive person who appeared certainly in excellent health, and who, I might say, on the entire trip never mentioned to me anything about his state of health. It was interesting to me that he and I were thrown together actually more than the doctor, because other members of the party—Dr. Rush and Mr. Irwin played gin rummy, which I do not play, and he and I talked

(Testimony of Dr. Francis Chamberlain.)

a good deal during that time and he informed me that his father had come down from Coos Bay to have me study him as a patient for a heart condition some four or five years ago, which I hadn't been able to recall.

Q. Now, I beg your pardon?

A. I was going to say generally, when there was some question of heart disease brought up, it seemed to me very unusual, the fact that I had—if he had known that he had heart disease, or if he had thought it——

Mr. Kriesien: If the Court please, I will object to this witness testifying or giving his opinion as to what another individual would have told him under the circumstances.

The Court: Objection sustained.

Q. (By Mr. Maguire): When you left La Paz, that's in the Gulf of California; is it not?

A. Yes, sir.

Q. Did you do any fishing on the way down toward San Juan [119] Del Cabo?

A. Yes, we—the first night of the trip we landed at La Paz, stayed on the boat, then the second day we went out toward the fishing grounds, fished and caught nothing. I think that's right, and it was the third day that we got into the better fishing country and the first fish that we caught on this trip, Dr. Rush caught. You saw on the movie, and then the second fish was this large marlin which we saw in the movie yesterday.

Q. Now, I believe you stated yesterday that Mr.

(Testimony of Dr. Francis Chamberlain.)

Lyons played that for some—I think you said 25 minutes, am I correct?

A. It was about a half hour.

Q. Did he have any assistance with the rod, anybody giving him assistance, or spelling him, or did he do all that himself?

A. No, he didn't. The fish was caught, the lines are left dragging with a sort of automatic device, and then when the marlin strikes the flying fish, which is used for bait, someone has to get the pole and take it from the deck of the boat over to the side of the ship and take the fishing rod and put it in this place in the center of the back of the boat and get himself rigged up in a chair in order to play it. And immediately, he said to Dr. Rush and me, you take this fish, and we said, no, we'd never seen a marlin caught, and we'd much prefer that he do it, so he played the fish for [120] about a half hour until finally it broke the line.

Q. When you play the fish—marlin fishing—I don't know about that, I am not an expert, what did Mr. Lyons do in playing the fish? Did that involve any physical exercise?

A. Yes, it involves a great deal of exercise and especially with a marlin like this, it was—they told us it was a very large marlin. In the first place, taking the rod with a big fish on the end of it from the side of the deck where it was fastened in a hole, and taking it across six feet or so to the center of the boat and get himself rigged up, meant a great deal of heavy strain, then the bottom of the pole

(Testimony of Dr. Francis Chamberlain.)

is rigged into the seat and then most of the pull is on the upper end of the fishing rod, but constantly the rod is pulled back in against the fish and then the reel is taken up and the load is so great that the man is strapped into this chair and this certainly is a strenuous physical tussle.

Q. Now, during that time, either during the time that he had that marlin in play or afterwards, did you—were you close, by the way?

A. Yes, I was right there all the time.

Q. Did he disclose any signs of distress, shortness of breath; that is signs of cyanosis?

A. Not at all.

Q. When he lost the fish, did he continue fishing or what happened then?

A. Yes, we continued to fish and it was getting sort of [121] late in the afternoon, and we had to come to our—well, let me see—he hooked this fish, I'd say about one or two o'clock in the afternoon the day before his death, and we fished around trying to get another strike and were unable to, then we had to proceed to get to our port, to San Jose Del Cabo, which is the town at the very southern tip of Lower California where we anchored for the night.

Q. At any time, from the time he hooked that fish, did he give any indication of any kind of distress?

A. None in the least.

Q. What was his physical and mental reaction to it?

A. It seemed to be quite natural in every way.

(Testimony of Dr. Francis Chamberlain.)

Q. Did you state whether or not he seemed despondent or depressed?

A. Not in the least no. His reactions were those of a vigorous, healthy, intelligent man having a vacation.

Q. I see. Now, that night, you say you anchored there right off San Lucas Del Cabo? A. Yes.

Q. And did the party go ashore; any of them when they got into port?

A. I don't think we went ashore. The port captain came, Senor Ruiz boarded the ship to get our papers and so on, and it was—he told us about the doves, and I think that Jim, who was probably the more interested huntsman of the crowd, [122] was always—for instance in the plane before, saying this is where we hunt ducks, and so on, and he obviously was interested in the hunting, but I don't know who started the conversation but I heard him and Senor Ruiz talking about dove hunting, but Dr. Rush and I took a small boat and went out with small rods for the local fish in the tail end of the afternoon and evening, but I don't think any of us went ashore until the next morning when it was time to go dove hunting.

Q. You had your dinner then and slept aboard the yacht? A. Yes.

Q. And during meal time, did Mr. Lyons eat excessively or what; did he drink excessively; just tell us what the situation was.

A. No; I don't think anyone ate excessively, or drank excessively as our host and cook was on a

(Testimony of Dr. Francis Chamberlain.)

salt-free diet, and he had this low-salt diet which none of the rest of us ate, three of us ate the ordinary salted food, and we had about the usual amount of drinking, that I think that four men would have on a trip, which meant cocktails before dinner. I don't recall anybody—I think I would have remembered if anyone had seemed drunk. I don't think anybody had more than the usual cocktail affair.

Q. There wasn't any drinking after dinner?

A. No; and I don't recall any drinking during the day on [123] any of the trip. I mean, before cocktail time in the afternoon. I am not sure about drinking after dinner, I don't recall. There might have been some but certainly there was no alcoholic orgy or I would have recalled it.

Q. I see, sir. Were you and Mr. Lyons together after dinner, to differentiate mixing around with Dr. Rush and Mr. Irwin, did they sit around the cabin and play?

A. They played gin rummy, and he and I talked a good deal.

Q. Who, you and Mr. Lyons?

A. Yes. Now, the last night before the accident, I don't recall talking to him as much as the night before that, but the night before that I think he and I must have spent four hours or so talking about a great deal about the problem of raising children and how not to let the wives spoil them.

Q. About what time did you retire that night?

A. Well, as I recall it, we went to bed early because we were getting up early to go dove hunting,

(Testimony of Dr. Francis Chamberlain.)

and I think we went—I should guess we went to bed around nine o'clock or so.

Q. At that time, did Mr. Lyons, during the evening, show—give any evidence or make any complaint of lack of ease or any condition other than of good health?

A. None at all. He seemed in excellent health.

Q. Now, the next morning, about what time did you arise?

A. The next morning I think we got up about five o'clock and [124] we had breakfast and Senor Ruiz was there in an automobile to take us dove hunting, as I remember, about six o'clock. It was fairly early.

Q. Did—in talking to Dr. Rush, he speaks of a Senor Ruiz?

A. That's it, R-u-i-z (spelling).

Q. They are one and the same person?

A. Yes, sir.

Q. Now, how did you get ashore?

A. We had a small boat which—we had our own small boat which had a little put-put on it which we took to shore. We were anchored perhaps some 400 feet from shore, as I recall.

Q. What kind was the automobile; large enough for the entire party to ride in?

A. It was a battered old car, held together by wire and so on. I think it was a Ford, and we all got in, Senor Ruiz had a son there about 11 or 12 years old along too. Our host, Howard Irwin, didn't go on this party, and I asked him why he didn't,

(Testimony of Dr. Francis Chamberlain.)

and he said he had a known heart condition and he thought that it might be strenuous, so he stayed on the yacht. So the rest of us, Dr. Rush and Jim Lyons and I—there were five of us in the car.

Q. Did the pilot go, Mr. Parrick?

A. Oh—and Mr. Parrick, the pilot.

Q. That's the airplane pilot, not the yacht [125] pilot? A. Yes.

Q. I see. Well, about how far did you drive in that automobile to the place where the dove shooting was to take place?

A. The roads were sort of roundabout, we had to skirt a slough to get there and it seemed to me it was about five miles, something like that, that we went out.

Q. I see. And what was the nature of the country when you stopped?

A. Well, this country was desert country. There was sand and cactus and sagebrush and shemise (sic), and that sort of thing. And this area where we went dove hunting was mostly sand dunes sort of country, some flat and then hills, due to pretty good-size sand dunes on which there was some desert vegetation, so it was sort of semi-rough, sandy country.

Q. Now, were you there when the men who were hunting took their stations? A. Yes; I was.

Q. You might just tell us what went on.

A. Well, there wasn't enough guns to go around. Mr. Lyons had his magnum shotgun, which I had never seen before, and which he showed me, and

(Testimony of Dr. Francis Chamberlain.)

showed me the magnum cartridges, and there was a .22 on the boat which Dr. Rush took and Senor Ruiz had a couple of old guns and one other .22 and one was a rifle and the other was a single barrel that looked like it might [126] fall apart, and which I think the airplane pilot took, but there weren't enough guns to go around, and I had my movie camera and didn't like to hunt doves very much and I stayed with Mr. Lyons. I was interested—he had been our host, had told me he was a great hunter and a very expert one, and I was interested in watching his technique to see how the experts did it, so I stayed with him for quite a while.

Q. Now, about how far from the road was it that he took his station, approximately?

A. Well, from where we left the car, we did quite a bit of walking, we actually—where his body was found—was not far. It was right close to the road. I think the movies show that it was ten feet or fifteen feet from the road, but we left the car, I should say a half mile away from where his body was and we walked around a good deal. There wasn't a dove in sight, and we walked around a great deal. We climbed some of the little sand dune hills around there and I stayed with him and Dr. Rush—I think he and Dr. Rush and I were together part of the time, due to—we were sort of restless and wondered if the Mexican really had guided us right, because he told us the sky would be black with doves and I didn't see a dove the whole time I was walking around with them.

(Testimony of Dr. Francis Chamberlain.)

Q. Well, now, did Mr. Lyons—in this walking that you are talking about, did he show any signs of shortness of breath or anything else which would be away from the normal good [127] health?

A. Not a bit. There wasn't anything that drew my attention to his behavior in any different manner from the way I did, and we climbed the sand dunes—the sand dunes, the one I recall I think was 80 to 100 feet high with rather difficult walking. It was loose sand and little cow trails around here and there when we walked around through the area, and certainly I don't recall—obviously I wasn't watching his breathing—because the question of his having heart disease hadn't entered my mind, but there was certainly nothing about his reactions that attracted my attention.

Q. And finally you came back to where he took his station to shoot, or were you there when he started to shoot?

A. No; we were still wondering around. Now, I think that's wrong. I think they did get their stations and I went along with them for a little while. He was hunting, as I remember, closest to town. Dr. Rush was the next one to him away from town and I think Bob Parrick, the pilot, was farther away from town, and I stayed with Jim a while, and no doves came along and the Mexican told us to just wait, pretty soon they will come, so I finally got discouraged and went to town to look for some local color to photograph.

(Testimony of Dr. Francis Chamberlain.)

Q. And when—you were then away from the place when the occurrence happened?

A. Yes; I walked to town, which the main part of town was [128] a little away from the place, you had to go around—skirt this slough to get to the town proper and I walked—I think perhaps two and a half or three miles into town.

Q. When did you first hear of the accident?

A. The Mexican came dashing in in his car and told me that Dr. Rush had been killed.

Q. Dr. Rush had been killed?

A. Yes; he got the names wrong. He said Dr. Rush had been killed and that his shotgun had gone up——

Mr. Kriesien: If the Court please, I object to this witness testifying as to what Mr. Ruiz told him. I move the answer be stricken.

The Court: It may go out.

Q. (By Mr. Maguire): You were informed of it by Senor Ruiz? A.. Yes.

Q. All right. And then what did you do?

A. I went right back with Mr. Ruiz to the body and it was then that I took my—I had my movie camera—I took this film that you saw and talked to Dr. Rush and we realized that there was nothing that we could do and then Mr. Ruiz took me in his car back to the yacht where I got a boat and told Mr.—our host, Mr. Irwin, what happened.

Q. Did he then come ashore?

A. Yes. We then came ashore together and went back to the body again. [129]

(Testimony of Dr. Francis Chamberlain.)

Q. And you went back in Senor Ruiz' car?

A. Yes.

Q. Now, at that time, do you know whether word had been given to any officers of the Government, officers medical or otherwise to come to the scene of the accident?

A. Yes. When I got there, Mr. Irwin immediately wanted to find out what we could do and send word back home. There were no telephones since we were in this rather primitive area, there was a telegraph line to La Paz, which was in not very good condition and they had great difficulty getting a message through to the police. They couldn't get through to La Paz at all, but they finally got a telegraph to San Jose Del Cabo, which was the place where the police and the doctors and hospitals were located, and this was about 50 miles north of Cape San Lucas.

Q. I thought I heard the word "San Jose," that's where the military and police post is?

A. Yes.

Q. When you returned to the scene of this catastrophe, what did you observe?

A. Well, at that time the question was about the ants and insects that were coming around, and I went back to town to pick up some material to put around it to try to get rid of the ants. We were told we must not touch the body any more, and that we must not disturb a thing until the police came. [130]

Q. At about what time was it that the police came?

(Testimony of Dr. Francis Chamberlain.)

A. The accident occurred at about nine in the morning and the police took about two to two and a half hours to get there, the police and the two doctors.

Q. Are those the two doctors who performed the autopsy? A. Yes, sir.

Q. And you returned to the town of San Lucas with them or at the same time?

A. I stayed there and watched their inquest. I guess you call it, took movies of the whole thing which I mentioned in court, which they insisted be exposed to the sun and be destroyed, and finally, I wanted to be present when the autopsy was performed, I was the only member of our party that spoke any Spanish, so I went with the doctors and with the body to San Jose in the station wagon.

Q. Before we go into that further, the evening before, when Senor—the port captain, Senor Ruiz, came, was anything said about any permit for guns or any license for shooting? A. Yes.

Mr. Kriesien: If the Court please, I think that is highly irrelevant to this proceeding, it would be merely hearsay.

The Court: Objection sustained. Whether or not they had a license is immaterial. They were actually hunting.

Mr. Maguire: Oh, there is no question about that, I [131] can bring it up again later.

Q. Now, you accompanied the two Mexican doctors and the body up to San Jose; is that correct?

A. Yes, sir.

(Testimony of Dr. Francis Chamberlain.)

Q. About what time did you reach San Jose?

A. It was a very bad road, mostly mountain trail and the distance was about fifty miles. I suppose it took us somewhere around three hours to get there.

Q. You arrived there about what hour in the afternoon or evening?

A. I think we must have arrived there about two o'clock in the afternoon, somewhere along in there.

Q. And did they have—was the body taken to the hospital there?

A. Yes, sir; the body was taken to the hospital and searched in my presence and left at their morgue.

Q. By the way, when it was searched, was there any nitroglycerin pills found?

A. No, sir. There were no nitroglycerin pills, there were no pills of any kind. I saw everything that was taken from his pockets.

Q. By the way, those two doctors I believe one was Rodriques and one was Serrano, where did they have—were they attached to the police or to the—what did they have as official positions [132]

A. They were working for the Government as physicians. It was some sort of a government setup.

Q. Doctor, about what were their ages?

A. About 30, perhaps 28 to 32, somewhere in there.

Q. Did you make a request to be present at the autopsy?

A. Yes, sir; I did.

(Testimony of Dr. Francis Chamberlain.)

Q. What answer was made?

A. The answer was that there was a good deal of red tape that had to be complied with, that the autopsy could not be performed immediately, and that they would let us know when it was to be performed.

Q. Did they let you know?

A. No, they didn't. We waited—I was in touch with Dr. Serrano several times. The other doctor could speak no English and my Spanish didn't do very well with him, so I talked to the head doctor, Dr. Serrano. I had a good deal of discussion with him, he showed me the hospital and their facilities and their morgue, and all the rest, but although we were available and stayed down at the precinct of the police most of the time, we were not informed about the autopsy.

Q. You therefore were not able to be present?

A. No, when we were rather anxious to be present.

Q. You say we were anxious?

A. Dr. Rush and I. [133]

Q. Did he accompany you?

A. No, I came on the station wagon, Dr. Rush came with Mr. Irwin by boat and they anchored off San Jose Del Cabo and they joined us later in the afternoon.

Q. And did you learn when, or about what hour the autopsy was performed?

A. Performed that evening around nine o'clock, we subsequently found.

(Testimony of Dr. Francis Chamberlain.)

Q. And did you make any subsequent inquiry to find out why you were not admitted or not permitted to be present or why you were not notified as to the time when——

Mr. Mize: Object to on the ground it is irrelevant and immaterial.

The Court: Overruled.

A. Yes, I expressed displeasure at not having been notified. I pointed out that we had expressly requested that we be permitted to be present at the autopsy.

Q. For what reason, if any, was given?

A. I don't recall. I don't recall what the excuse was. It was certainly clear that I kept pestering this fellow several times in the course of the day to find out when the autopsy would be, stating that we wanted to be there. There was no question about his understanding my request.

Q. Going back now, to what you observed when you returned from San Lucas to the spot where Mr. Lyons lay dead, what [134] did you observe with respect to his body; any evidence of any unusual conditions; wounds; cyanosis; or what? Just tell us in your own words, in detail about that.

A. I was impressed primarily by the fact that his face showed these lacerations and bloody patches.

Q. What about the powder burns?

A. I wasn't—I am not sure I'd know a powder burn when I saw one, but the face obviously was

(Testimony of Dr. Francis Chamberlain.)

lacerated and bloody so that my immediate feeling was, I thought that the shot had gone into his brain. Actually, my first looking at him, that was the only way in which he appeared different to me, from the ordinary man who was dead, and had been dead—he was probably dead a half hour before I got there.

Q. Did you participate in any examination of the ground to see whether or not, in the discharge of the gun, any of the ground had been disturbed?

A. Yes, I did, and of course the ground, the sand had been walked on around the body before I got there. I think that must have been in the course of Dr. Rush's attempts to apply artificial respiration and so on, but I observed so that the tracks meant very little from the walking around, but I observed the terrain, the type of bushes that were nearby. There was a shemise (sic) wood, some sort of a well-weathered log, you called it a log trunk on the ground a few feet from where he lay. I thought this, looking at it, was that [135] maybe he tripped over that log and fell.

Mr. Kriesien: If the court please, I move that that answer be stricken on the ground it is not responsive to the question and is not a field in which this witness is qualified to render an opinion.

The Court: Motion granted.

Q. (By Mr. Maguire): What was the name of that wood? A. Shemise (sic).

Q. Shemise (sic) wood, that was not a living tree, was it, or bush? A. No.

(Testimony of Dr. Francis Chamberlain.)

Q. Is it a bush or tree?

A. Well, I guess it's halfway between the vegetation there, the trees or brush, whatever it was, there was low brush a foot or two high. There is this other stuff, I call it shemise (sic), I am not sure of its identification, that was 12 or 15 feet high and there were occasional trees that were maybe 25 feet high.

Q. Did you make any examination to determine whether or not the discharge of the gun had torn any limbs or foliage off of any of the brush around there or trees?

A. I looked around a moderate amount to try to get some clues which I was unable to obtain. I was going to say that my feeling was that this log on the ground, that was important——

Mr. Kriesien: If the Court please, I object and I move [136] that answer be stricken, your Honor, as not responsive, and not within the realm of opinion testimony.

The Court: It may go out.

Q. (By Mr. Maguire): Don't speak about your feelings. What, as to whether or not you made an examination of the ground to determine whether the shotgun had been fired close to the ground or into the ground or any indication it had been fired into or hit—the charge had hit this brush or tree or anything like that?

Mr. Kriesien: If the Court please, he has already testified that the ground had been walked

(Testimony of Dr. Francis Chamberlain.)

upon. This was a half hour after the discovery was made.

Mr. Maguire: We will not argue about it.

The Court: The question is withdrawn.

Q. (By Mr. Maguire): Now, did you note any shotgun shells either on the ground in the immediate vicinity where Mr. Lyons' body lay or any live shotgun shells which you have described Mr. Lyons telling you were magnum shells—about how many shells were there for the gun that you noticed? A. I don't recall.

Q. Was there more than one or did you see any?

A. I don't recall.

Q. Now, you have——

A. This was after the accident, I paid a lot of attention to the shells before the accident, and examined them carefully. [137] After the accident, I recall that the police had the four doves and they had some shotgun shells—the cases that they had, and I don't know whether those had been gathered up before or afterward. I didn't notice.

Q. I see. Now, did Mr. Lyons—he had shown you what you call the magnum shells the evening before. Are you familiar with the ordinary shotgun shell as compared to the shell you saw that night?

A. Yes, sir.

Q. Will you describe the difference?

A. The magnum shells were considerably longer was the main difference. I had never seen the magnum shells before, they were the longest shotgun shells I had ever seen.

(Testimony of Dr. Francis Chamberlain.)

Mr. Maguire: Your Honor, before we go into the medical testimony itself, I want to get all of the testimony, we have Dr. Rush here to supplement some of the things that Dr. Chamberlain has testified to, and because it was necessary to get all the facts and thing, may he be withdrawn?

The Court: Any objection?

Mr. Kriesien: No objection.

The Court: He may be withdrawn temporarily.

Mr. Maguire: Shall I call a witness or Dr. Rush, or would your Honor like to have a recess?

The Court: There will be a short recess.

(Witness excused.)

(Whereupon, a short recess was had.) [138]

The Court: Proceed.

Mr. Beebe: Call Dr. Homer Rush, if the Court please.

DR. HOMER P. RUSH

was thereupon produced as a witness on behalf of the plaintiff herein and, having been first duly sworn, was examined and testified as follows:

The Court: I will say for the record, gentlemen, that I have been favored with a copy or I assume maybe the original of Dr. Rush's deposition, which I have read with considerable care. Now, there was some discussion made the other day that the doctor wanted to make certain corrections in his deposition, certain language corrections, and from my

(Testimony of Dr. Homer P. Rush.)

observation of the deposition, it has not been corrected, although he did sign it.

Mr. Beebe: That's correct, your Honor, he was advised that if anything came up from the use of the deposition which he wanted to correct that it would be taken care of at this time, and I therefore instructed him to sign it and return it under those instructions from the Court.

The Court: Very well.

Direct Examination

By Mr. Beebe:

Q. Your name is Dr. Homer P. Rush; is that correct? A. Yes, sir.

Q. Are you a duly licensed and practicing physician and [139] surgeon in the State of Oregon?

A. Yes.

Q. Doctor, I want to go into your qualifications. Would you advise the Court of your medical background?

A. I graduated from high school in Nebraska, went to the University of Nebraska for two and a half years previous to World War I, and I left for the Army. Came out to Oregon in 1917, entered the University of Oregon Medical School at that time, got my M.D. from the University of Oregon Medical School. Was granted my A.B. by the University of Oregon with my previous work at Nebraska. I took my master degree at the University of Oregon. Went

(Testimony of Dr. Homer P. Rush.)

back to the University of Chicago in physiology, took post graduate work with Dr. Carlsen in the Department of Physiology at the University of Chicago. That was after I received my M.D., which was in 1921. I then taught physiology full time for a period of approximately five years. Went over to the Department of Medicine; worked under Dr. T. Homer Coffman, who at that time, was Professor of Medicine at the University of Oregon Medical School and later went to the University of Vienna, came back from the University of Vienna about 1928. Have been connected with the University of Oregon Medical School since that time, and at the present time my rank is Clinical Professor of Medicine, or Professor of Clinical Medicine. [140]

Q. Doctor, are you certified as a specialist by any of the American boards?

A. I am, by the American Board of Internal Medicine and sub-speciality in cardiology.

Q. How about your practice, Doctor, is your practice limited?

A. It is limited to internal medicine.

Q. How about your practice with respect to cardio-vascular disease?

A. I presume about 70 per cent is that type of practice.

Q. And the balance would be other problems?

A. Problems in internal medicine and diagnosis.

Q. Now, Doctor, with respect to the cardiology,

(Testimony of Dr. Homer P. Rush.)

have you written any textbooks in that field or articles?

A. I have written some articles in that field.

Q. And the articles, were they published?

A. I have had articles published in the *Annals of Internal Medicine*, *Northwest Medical Association*, *American Medical Association*; *Journal of Endocrinology*, *American Heart*.

Q. Have you finished?

A. Well, there were others but I haven't got any list. I could furnish a list of publications.

Q. That's all you can think of right now?

A. Correct, sir.

Q. Doctor Rush, were you acquainted with James Lyons in his lifetime before the trip on which he died? [141]

A. No, I was not.

Q. Whose guest were you on that trip?

A. Mr. Howard Irwin.

Q. Was Mr. Irwin a patient of yours?

A. Mr. Irwin was a patient of mine.

Q. Where did you first meet James Lyons?

A. I believe it was in Los Angeles.

Q. This was on the occasion of the trip where Mr. Lyons finally died; is that correct?

A. That is correct. I flew down to San Francisco and met Dr. Chamberlain, and we flew to Los Angeles and met Mr. Lyons in Los Angeles.

Q. How many days before his death was it you first met Mr. Lyons?

A. I believe it was on a Saturday. It would be,

(Testimony of Dr. Homer P. Rush.)

I think, February the 8, 1953, but I am not positive of that date.

Q. The 10th was the date of his death; is that correct, Doctor? A. Yes, I believe it is.

Q. When you met Mr. Lyons in Los Angeles, what did you then do?

A. We boarded the plane which Mr. Lyons and Mr. Irwin had and flew on down to La Paz, Mexico.

Q. And you were flying in company with Mr. Lyons on the way down? [142]

A. That is correct.

Q. Now, what did you observe of Mr. Lyons with respect to his general physical characteristics?

A. I thought Mr. Lyons was a very vigorous, husky businessman. I rather had the impression that he felt in pretty good physical status, he loaded a lot of supplies into the plane. It seemed to me that he was doing much more work than the pilot with regard to shifting things around, and I saw nothing that would lead me to believe that he was anything other than a very healthy man of mid-forties, I would have guessed him to be.

Q. Now, during the flight southward into Mexico, did you have occasion to observe Mr. Lyons in the airplane? A. I did.

Q. Did he show any signs of shortness of breath or illness of any kind at the altitude at which you were flying?

A. He showed no signs of any illness of any kind that I know of.

(Testimony of Dr. Homer P. Rush.)

Q. How did his mental status seem to be during that trip? A. Excellent.

Q. Was he in good spirits? A. Excellent.

Q. Now, after you arrived at the end of the flight, what did you then do?

A. We were met down there by Mr. Irwin and some of his men [143] and proceeded to go over to where the yacht was, it was not docked, because it was away from the dock a little ways, loaded our luggage onto a small boat and went out to the yacht. Moved it onto the yacht, got ready to set sail, so that we could get down to the fishing ground as soon as possible.

Q. What time of day was it that you arrived at La Paz?

A. I would think late afternoon, but I really don't recall exactly.

Q. Was it still daylight? A. Yes, it was.

Q. You say that you moved your luggage and gear off so that it could be placed on the yacht?

A. That's right.

Q. Did Mr. Lyons do any of that work?

A. He did.

Q. What was the nature of the articles that he carried and lifted and moved?

A. I don't know as I can answer that question truthfully. The ordinary supplies. I didn't pay much attention to them. I know some of them were boxes that I imagined to be canned goods or something of that type, but I am not certain.

(Testimony of Dr. Homer P. Rush.)

Q. Now, did you observe any symptoms of fatigue or shortness of breath or anything?

A. I did not. [144]

Q. What would be an indication of ill health at that time? A. I did not.

Q. Then did you go onto the boat itself, onto the yacht?

A. We did. We had a distance of—oh—maybe a half or three-quarters of a mile that we were driven up the dock, then took a boat and went out to the yacht.

Q. What did you do after you got on board?

A. We were assigned to cabins and I think I tried to unload my gear and clothes and sort of get it arranged. In the meantime Mr. Irwin had two Mexican boys that were sort of crew men and he stored away part of the supplies that were brought aboard and pulled up anchor and started on our way.

Q. Started out for the fishing ground?

A. That's right.

Q. Did you have your dinner on board the ship that night? A. We did.

Q. Now, at any time during that day, had there been any drinking or——

A. There hadn't been any drinking until after we got aboard the yacht. I mean, I think, we had cocktails before dinner that night, although I don't know—I don't think there had been any unusual drinking. I am not even sure that we had cocktails that night.

(Testimony of Dr. Homer P. Rush.)

Q. And did you all have dinner together?

A. We did. [145]

Q. Do you recall what Mr. Lyons ate?

A. I do not. He ate the same things the rest of us did.

Q. Was it a large meal or a very heavy meal?

A. I would say an ordinary dinner.

Q. After you had eaten or during the time you had eaten, did Mr. Lyons show any signs of any digestive disturbance at all? A. He did not.

Q. At any time while you were with him, did he show any signs of digestive disturbances at all?

A. He did not.

Q. Anything to indicate—that would show gall bladder trouble?

A. He showed no signs of anything that I would have noted that would show any type of ill health.

Q. Now, after you arrived at the fishing grounds did you sleep on the boat overnight or on the ship overnight? A. We did.

Q. Then what did you do the next morning?

A. We didn't arrive at the fishing grounds that first night. We got the boat underway and went part way down and anchored and slept for the night and started out again the next morning. The second night we got down to San Lucas.

Q. I see. And when you arrived at San Lucas, that was where the fishing grounds were; is that correct? [146]

(Testimony of Dr. Homer P. Rush.)

A. Between—well, not far from San Lucas, I'd say possibly a little ways north of San Lucas.

Q. And then the next morning was when you went fishing; is that correct?

A. No, it wasn't quite that soon. I would think it was probably the early part of the afternoon when we began to see evidence of marlin and other ships that were fishing for marlin. At least that is what I was told it was.

Q. Well, on the occasion when Mr. Lyons hooked the marlin; when was that?

A. I believe that was the previous afternoon. I mean previous to the day of the accident.

Q. Yes. Now, how long had you been fishing on the afternoon he caught the marlin, before he hooked it?

A. Oh, I presume maybe two hours, I don't recall the exact time element.

Q. During that period of time before you hooked the marlin, had he caught any fish?

A. Not to my knowledge.

Q. Had you caught any?

A. I don't recall whether he caught any before or after that. We did catch some small fish, but I don't recall just the time element in regard to when this marlin was hooked.

Q. And while you were on this fishing trip, how did Mr. Lyons strike you as to his condition? [147]

A. Again, as I stated, I thought his condition was excellent. He seemed to me to be a very vigorous middle-aged businessman, I had the impression,

(Testimony of Dr. Homer P. Rush.)

that probably gave of himself quite a good deal; he seemed to be physically fit.

Q. At any time, did you hear him make any complaint about his physical condition?

A. I did not.

Q. Now, Doctor, will you tell the Court about the occasion when Mr. Lyons hooked the marlin?

A. Well, of course, in fishing for marlin, they have these rods out, and they are put in gear, nobody holds the rod, they're rigged, and on this particular yacht, we had four lines out and when a marlin takes the lure, then somebody takes the rod and at this time the marlin was hooked and Mr. Lyons took the rod. They do have a rig that is strapped around the body with a sort of a leather-like harness with a place in which the rod can be placed against the body to give some support on holding it. Usually they sit in a chair that is a swivel chair in the back part of the yacht, so that there is some give back and forth. They are not standing all the time, and when Mr. Lyons took this rod, he had no harness on. I imagine it was probably a few moments before the harness was put on him, which it was by the Mexican boy, and during that time he was doing it all with his arms and associated movements with his body, and, of course, he [148] placed the rod in the harness and sat down. The marlin seemed to be a very good-size one, so I was told, that was the first one I ever saw. It did break water several times. I have several still pictures which I took where the marlin is clear out

(Testimony of Dr. Homer P. Rush.)

of the water, and he must have played this fish for a period of around thirty minutes or so before the fish broke the line.

Q. Now, Dr. Rush, in talking about playing the fish, just to get it on the record, what does the fisherman do?

A. The fisherman has to take the rod——

Q. Holding it with two hands?

A. Usually, yes, and he has one of them that controls the reel to try to reel in and the rest of it is in the harness on his body, near the pole, so that it's back and forth, and you reel in and the fish will run, and if you "quash" it, as they call it, he will break a line, so you let the fish run out and then you reel it back in again and I would assume it to be quite hard work.

Q. Did it appear to be hard work to you?

A. It appeared to be hard work to me.

Q. And would you say that there was considerable effort involved over a period of time in playing such a large fish, particularly for 30 minutes?

A. I would think there was a reasonable amount of effort. Mr. Irwin, who was known to have heart trouble did not play [149] it himself, because he felt it was too much work.

Mr. Kriesien: If the Court please, I object to this witness testifying for Mr. Irwin.

The Court: That matter of the fact that Mr. Irwin did not play the fish may stay in the record.

Q. (By Mr. Beebe): Now, Dr. Rush, in order to shorten things down, on the morning of Mr.

(Testimony of Dr. Homer P. Rush.)

Lyons death, the day you went dove hunting, will you describe how you got out to the hunting ground?

A. We got up rather early that morning, I would assume some place between 5:00 and 6:00 o'clock, to my memory, I think we were to meet Senor Ruiz, as I have called him, about 6:00. We got into the dory which had a little motor on it, were taken ashore and walked possibly the equivalent of a block in the sand up to the dock where the car of Senor Ruiz was parked. It was a rather old vintage car, it was held together with considerable wire, and we got into this—which would be the equivalent of an old Ford touring car, I would think, and drove up to the village of San Lucas. It was perhaps a half or three-quarters of a mile from where we landed, at which place we picked up Senor Ruiz' son, a lad of about eleven or twelve, and brought the guns that Senor Ruiz had and put these in the car and the lad also got in with us, and we drove, I would say, a distance of perhaps three to five miles along parallel to the bay to the [150] place where we parked his car and got out, and there were no doves flying, and it was probably about 7:00 o'clock when we got out there.

Q. Before you go further, getting back to the fishing incident, did you observe Mr. Lyons after he played that marlin for 30 minutes?

A. Yes, I was with him all the rest of the day, except for the time that Dr. Chamberlain and I took the dory out and went for small fish in the bay.

(Testimony of Dr. Homer P. Rush.)

Q. What was his condition after the 30 minutes of exertion?

A. I thought it was very good. I might add this, that we did have another period of time when there were a lot of fish ducks flying around, and guns were gotten out, and Jim used guns in target practice at these and he certainly was steady. He seemed to know his guns. Which had occurred after his playing with the marlin.

Q. In other words, he shot some fish ducks from the boat?

A. That's right.

Q. And immediately after he lost the fish, did you observe him; were there any symptoms of distress at all?

A. None at all.

Q. Now, then, returning to the dove hunting expedition, after you got out to the place where you were stopped, what did you do then with respect to Mr. Lyons?

A. We got out of the car and divided guns, so to speak, [151] and there being no doves we walked around. I think that Bob Parrick and I and Dr. Chamberlain and Mr. Lyons took two or three little hikes around the country. I can remember one of them where Mr. Lyons and Dr. Chamberlain and I went up a little trail over a sort of a sand dune hill, and I can remember one remark he made was, "It's so nice to be alive on such a beautiful morning," and he seemed to be in excellent health, at that time.

Q. How about his spirits?

A. Excellent.

Q. Now, approximately how far would you say

(Testimony of Dr. Homer P. Rush.)

that you walked on these little excursions while you were waiting for the doves to come over, Dr. Rush?

A. Oh, I would approximate a total distance of at least a half mile or so, because they were small excursions, the equivalent of two to three hundred yards, maybe a little further, some of them.

Q. Now, did you observe the shotgun that Mr. Lyons was using that morning? A. I did.

Q. Did you see any of the shells that he had in his possession? A. I did.

Q. Are you familiar with shotgun shells?

A. I am a little.

Q. That is, do you own a shotgun yourself?

A. I do. [152]

Q. And what gauge is it? A. 12 gauge.

Q. Is it a magnum?

A. No, it is not. It is a Winchester.

Q. And did you make any observation as to the type of shells he was using, whether they were larger than usual?

A. Yes, they were much larger than the ones I used, because I remarked about it and looked at one of them. I had never used a magnum shell, myself.

Q. Approximately—well, will you state for the Court, Dr. Rush, coming down now to the time that you took your positions for shooting?

A. Along about 7:30, the doves began to come over, as the Mexican had told us they would, and I was standing by Mr. Lyons and he shot about at least two or three doves, and when doves would

(Testimony of Dr. Homer P. Rush.)

come over he would shoot a dove and a dove would fall. I mean I saw him shoot, it was on the wing, of course.

Q. Let me ask you a question there, at the point where he shot those two doves, Dr. Rush, was that approximately at the place where he was later, where he died?

A. I believe it would be within 30 yards of where he shot those two doves, Dr. Rush, was that approximately at the place where he was later, where he died?

A. I believe it would be within 30 yards of where he was later.

Q. Now, after he had shot those two doves, how long a period of time was it that had transpired, I mean the time taken [153] in shooting the two doves while you were with him?

A. The doves were coming over quite good at that time, and I would feel that there was less than a minute between the time that one would come over and he would shoot, and then another would come over and he would shoot. I would not say it was two, it might have been two, it might have been four. I don't recall. In the meantime, I was taken away by Senor Ruiz and suggested that I go up the road a little bit and off the road a little bit near where there was a fairly large tree that doves tended to land in, and I said with my .22 rifle I might get a chance to shoot at a dove that landed in the tree, so I was about—I imagine—purely guess work, I think I could pace it out on a road, but I imagine—

(Testimony of Dr. Homer P. Rush.)

I never measured it as to what that distance was, but I would guess some place around 60 or 80 feet, maybe further, I don't recall just exactly.

Q. 60 or 80 feet from where Mr. Lyons was?

A. Yes.

Q. Or do you mean——

A. I don't know whether it was yards or feet. As I say, I don't know what the distance was. As I stated in my deposition, I don't——

Mr. Kriesien: If the Court please, I move that the answer be stricken with respect to the distance that he might have been from the deceased. [154]

The Court: Well, see if we can't get it, can you give us your best estimate, Doctor, either in feet or yards how far away you were?

The Witness: I would feel I was about half the distance to the corner of that building across the street; how far would that be?

Mr. Beebe: Are you referring to the Congress Hotel building?

The Witness: Yes, I presume it to be closer to 60 yards than to 60 feet.

Q. (By Mr. Beebe): Now, Dr. Rush, will you tell the Court in your own words after you took your station, just exactly what you heard and observed from that point forward?

A. Well, from that point forward I had my back to Mr. Lyons.

Q. Let me ask you this, if you had looked for him, could you have seen him?

(Testimony of Dr. Homer P. Rush.)

A. I could not, because the brush—it was in the country.

Q. Now, go ahead.

A. I had my back in that direction and the doves, as I say, were coming over quite rapidly. I heard the shotgun explode from the position where he was and saw a dove fall, and I thought I heard a second one some minute or two later, and saw a dove fall, but there is one sequence that was different than any of the others, and that was the time that I heard the shotgun explode and saw the dove fall and the second [155] shot that came on much sooner than the other shots that had been fired, but—and saw no dove fall—then I would look back in that direction and when I did I would see a dove fall.

Q. You had seen a dove fall on every other occasion?

A. I had. My reaction, at that time, I mean it went through my mental processes that Jim was not letting me have a chance to get a dove, to allow a dove to land in the tree and give me a chance to shoot, and I was getting ready to holler at him when I heard a stertorous type of breathing.

Q. Doctor, can you find some other words to describe what you mean by stertorous type of breathing?

A. Sort of like a snore type of breathing, a snarling bull was the impression I had from the noise that I'd expect a bull to make when it was snorting around, and I wondered what that was at

(Testimony of Dr. Homer P. Rush.)

the time, and it was coming from the direction where Mr. Lyons was, and my reaction was that it was probably a wild animal of some type, and we had seen cows on the trail, and I wondered about a mad bull or dog or something and went to the road and went down that way. I don't know how long it took me to walk it, it didn't seem but a few seconds to me. I think I estimate it around 10 or 15 seconds. It certainly isn't—wasn't much more than that—I probably—I trotted down the road, wondering what I would do if it were a bull and looked to see how close the nearest tree was, [156] then I saw Jim lying on the ground on his face under a mesquite bush.

Q. Just a moment, Dr. Rush, now on the question of time, can you estimate how long it was before the second shot—that is to say the one immediately before you heard the breathing; how long was it between the time you heard the shot and the time you heard the stertorous breathing?

A. About enough time for me to think, why don't he let some of the doves land in that tree so that I could get a shot at some, so I would say it was just a few seconds. I don't know how I can estimate it in numbers or seconds because at the time, of course, this all happened so fast, I didn't even think of those things.

Q. You couldn't estimate?

A. I wouldn't think it would be over three or four seconds.

(Testimony of Dr. Homer P. Rush.)

Q. Now, then, when you arrived and you say that Mr. Lyons was under a mesquite bush?

A. That's right.

Q. Do you mean by that that there were branches hanging over him?

A. Over him, that's right.

Q. In what position was he in?

A. He was laying face down on his shotgun. The shotgun was going out over the left shoulder at approximately—it must have been a foot—eight inches—something like that— [157] and that's the muzzle of the gun and the other part of the gun he was lying on with his chest, and it came out on the right side about the angle of his hip, I imagine, with the stock.

Q. Now, do I understand, Doctor, that the muzzle of the gun protruded upward diagonally from a point just below his left shoulder about a foot?

A. Yes, sir.

Q. And the butt of the gun protruding at an angle from a point past his right hip; is that correct?

A. That's right.

Q. Now, was Mr. Lyons, was his whole body under the mesquite bush?

A. No, sir, I wouldn't think so, I would think maybe half of it or so.

Q. It would be the upper or lower?

A. It would be—was the upper half, the head and chest and thorax would be under the mesquite bush, and I think probably the buttocks and lower leg extremities were out.

(Testimony of Dr. Homer P. Rush.)

Q. Now, Dr. Rush, will you tell the Court what you did then and what you observed from that point until Mr. Lyons was dead?

A. I saw—when I saw this—the first thing I noted was blood coming from the right side of his face and I thought he had an accident and shot himself, and I hollered help, [158] and Senor Ruiz had gone over one of these sand dunes to pick up a dove, and Bob Parrick and the Mexican boy had gone up the road a ways to shoot doves. Senor Ruiz reached me first and I would feel it was in a matter of not more than another minute or so, maybe less than that; Bob Parrick and the Mexican boy were there another minute or so later, and we rolled Mr. Lyons over to try to get him in a more comfortable position for breathing, so that we were sure that he did not have sand in his nose and mouth, and had him a little bit toward the right side as we rolled him over.

Q. Doctor, when you rolled him over, did you roll him outward from the bush?

A. We rolled him outward from the bush.

Q. Thank you, proceed.

A. And Bob Parrick had some experience, I believe, in first aid. He had helped me in trying to do artificial respiration——

Mr. Kriesien: Pardon me a moment, could you speak a little louder? I am having extreme difficulty in hearing through the noise outside.

The Witness: I am sorry. Bob Parrick and I attempted artificial respiration. He was pulseless at

(Testimony of Dr. Homer P. Rush.)

this time, but had definite stertorous type of breathing with a good deal of noise in it, and after a matter of a minute or two or three, I don't recall just how long, he began to show evidence of pulmonary edema. I mean by that, frothy sputum began [159] to come out of his mouth and nose in his breathing, which gradually became blood tinged. I attempted to listen to his heart with my bare ear, but I couldn't because of the noise of the breathing. I put my hand on his chest and felt a tremulous type of activity going on, and, as I state, he was pulseless, I could get no pulse of any type. I could not even find any pulsation in the carotid vessels in the neck. I never felt more helpless in my life. I thought about some things we had on the ship, that we might use, but they were five miles from where we were, and in approximately five or six or seven minutes, something like that, he was gone.

Q. This tremulous thing that you felt when you placed your hand upon his chest, was that a heart beat; a fast heart beat?

A. I couldn't answer that question, whether it would have been, I thought it was heart action, but there was so much gurgling of this frothy fluid that was beginning to gather in the bronchus, that part of it could have been that type of vibration and I felt it in the chest wall.

Q. Now, Doctor, can you describe that sensation by likening it to anything that any of us might have felt?

(Testimony of Dr. Homer P. Rush.)

A. I likened it, when I gave the deposition, to the purring of a cat.

Q. Were you able to detect any rhythmic heart beat? A. I was not. [160]

Q. Now, when you concluded that he was dead, was that when the breathing stopped?

A. That was right. It was after we tried artificial respiration for a little while and it didn't get any result from the artificial breathing.

Q. Now, was there any cyanosis of Mr. Lyons' face when you first arrived there?

A. Definite cyanosis was present when I first saw him; he was reddish.

Q. Did that condition continue?

A. Continued, and gradually the red color began to disappear and it became more and more——

Q. Was Mr. Lyons conscious when you first——

A. He was not.

Q. Did you observe the wounds on Mr. Lyons' face? A. Yes, I observed them.

Q. Will you describe them to the Court?

A. They were like sort of scratches and erosion of the skin, some bruising like appearance, I thought there was some blood that had dried on them. They didn't look like a scratch that might come from a brush scratch, or anything of that type, they looked more like what I would expect the explosion of a gun to give a wound, and I think I felt one pellet under the skin that I interpreted as being a shot from the bullet.

(Testimony of Dr. Homer P. Rush.)

Q. You felt at least some hard lump at one of these excoriations or lacerations? [161]

A. That's right. And this involved the face and neck and temple, as I recall.

Q. On which side? A. On the right.

Q. Did you observe anything which appeared to you to be powder burns?

A. I thought there were powder burns because there seemed to be some bluish markings which I understood powder burns make if they are deposited under the skin.

Q. Where was that?

A. On the right side of the face and neck. I don't recall specifically.

Q. Did you observe any injury on the ear on that side?

A. I don't recall any on the ear.

Q. The eyelid?

A. I don't recall anything on the eyelid.

Q. Now, then, after you concluded that Mr. Lyons had died, what did you then do with respect to making any investigation around the scene of the accident?

A. The car was parked up the road a ways from the village by an approximation of a quarter to half a mile, and Senor Ruiz and his son went up and got the car and were going into the village and down to the ship. Bob Parrick and I were going to stay there. Of course we were distinctly upset. Bob had been very, very fond of Mr. Lyons and the [162] first thing I tried to do was calm down Bob Par-

(Testimony of Dr. Homer P. Rush.)

rick, then we looked around the area. We had rolled him out from under this bush when he was in his terminal stages. I took the guns, the .22 that I had and the magnum that was lying there and laid them out a little way from him, making sure those chambers were empty and we looked over the brush around there and the ground around there and so forth to see if there was any evidence of an explosion of his gun going into the ground or going off horizontally into the wood or the brush or anything like that. There were no tracks around this mesquite brush or under it. We kept people away from that and that was kept empty until the police came. There were tracks that were around him when we rolled the body out, but there were no tracks on the other side of any moment, but there might have been a track or two around, but it wasn't tramped down, we purposely watched it.

Q. Did you find anything on the ground or in the area or along the branches or in the leaves of the bush indicating that there had been any blast?

A. We did not. We could not find anything that would indicate that.

Q. Now, then, what did you then do, Dr. Rush, after making that investigation?

A. We went along the edge of the road and walked back and forth to go and look and see how things were and we were [163] worried about the insects getting around. It was interesting that a car went by, it contained a Mexican couple and the Mexican lady could speak some English. Of course,

(Testimony of Dr. Homer P. Rush.)

the body was right close to the road so it could be seen, and——

Q. Can you speak up?

A. The body was right close to the road where it could be seen and she had informed us that in Mexico it was unlawful to move that body.

Mr. Kriesien: If the Court please, I object to this line of questioning on the ground of hearsay and move it be stricken from the record.

The Court: Motion granted.

Q. (By Mr. Beebe): Well, Dr. Rush, just wait till I ask you a question; what, if anything, did you then do with respect to Mr. Lyons' body and before the arrival of any official and why did you do anything?

A. We didn't do a thing before the arrival of the police from San Lucas, except to stand guard, so to speak. We stood guard from then on. Now, following this, we did several things.

Q. All right, after that, after the police arrived, what did you do?

A. We were, of course, in warm country, the sun was coming up, and it was getting hot. We tried to get mesquite brush there and build a little type of shelter over the body, and [164] as stated, the insects were beginning to accumulate. We went back finally to the ship, got oil, and make an oil ring around the body to keep the insects from getting into it and got a tarp, and put a tarp over it.

Q. Now, then, Dr. Rush, if you recall, what time was it when the officials finally arrived at the scene?

(Testimony of Dr. Homer P. Rush.)

A. My impression was that it was early in the afternoon. I thought—I remember they promised to be there around 10:30 and that they weren't and then at another hour, and they weren't, and it seems as though it was early in the afternoon when they got there. That is purely memory, I might be wrong.

Q. And then they came and started to investigate the scene?

A. There was an investigation, I imagine you could call it, held at the scene, in which these officials that came from San Jose looked the situation over, and that included the two doctors and apparently a magistrate, who, incidentally, is obviously very powerful, but he had two or three helpers with him, they went over the factors and these two doctors looked very carefully over things, I was with one of them when he did it, and made their notes and suggestions and the body was then lifted into a station wagon and taken to San Jose.

Q. Dr. Chamberlain accompanied——

A. Dr. Chamberlain accompanied that [165] group.

Q. Did you go along to San Jose?

A. I did, I went about an hour later.

Q. How did you get there? A. By car.

Q. Were you present, Dr. Rush, when Dr. Chamberlain requested the Mexican doctors that you and he be permitted to be there at the autopsy?

A. I don't know that I was present at the time he made his first, but I was there later in the day

(Testimony of Dr. Homer P. Rush.)

and we went out to the hospital on two or three occasions to find out where they were going to hold the autopsy, and would they let us know and the like, and after each 30 or 40 minutes would go back again and try to find out again.

Q. And when you weren't going to the hospital to try to find out, what were you doing; did you remain with the police?

A. At this magistrate's office, or whatever his title was, I don't know.

Q. Did you ever get to attend the autopsy?

A. We did not.

Mr. Maguire: Your Honor, that is all we wish to inquire of this witness at this time. We want to go into the medical testimony at a later time. I suggest, if the Court please and has no objection, that we take our noon recess.

The Court: All right. Will it inconvenience you to come back at 1:30? [166]

Mr. Maguire: Not at all, your Honor.

The Court: All right, then, 1:30. Court is in recess.

(Whereupon, a recess was taken until 1:30 o'clock p.m. of the same day.) [167]

(Pursuant to recess, proceedings were resumed at 1:30 o'clock p.m., November 23, 1955.)

The Court: You may proceed, gentlemen.

Mr. Beebe: Call Dr. McKeown, if the Court please.

DR. RAYMOND M. McKEOWN

was thereupon produced as a witness on behalf of the plaintiff herein and, having been first duly sworn, was examined and testified as follows:

The Court: Will you state your name, please?

The Witness: Dr. Raymond M. McKeown, Coos Bay, Oregon.

Mr. Kriesien: May the record indicate, I presume that Dr. Rush was temporarily withdrawn from the stand?

Mr. Beebe: We have taken the liberty because Dr. McKeown has to be back, to call Dr. McKeown a little out of order, because he flew up from Coos Bay and he has to go back.

The Court: How do you spell your name, Doctor?

The Witness: M-c-K-e-o-w-n (spelling).

Direct Examination

By Mr. Beebe:

Q. Dr. McKeown, you are a duly licensed and practicing physician and surgeon in the State of Oregon? A. I am.

Q. Will you state for the Court, Doctor, your medical degrees and qualifications? [168]

A. I have a bachelor of arts from the University of Oregon in 1924. I have a M.D. degree from the University of Toronto and—Toronto, Canada, in 1929. I have six years of postgraduate work at Yale University in New Haven, Connecticut, from 1929 to 1936. In June of '36, I came to Coos Bay, Ore-

(Testimony of Dr. Raymond M. McKeown.)

gon, where I opened my office for general practice.

Q. Have you practiced there since that time, Doctor? A. Yes, sir.

Q. Do you have a specialty?

A. Not one that I would practice, but I was a qualified surgeon, an obstetrician and gynecologist.

Q. Your practice in Coos Bay is a general practice? A. A general practice, yes, sir.

Q. Dr. McKeown, did you know James Lyons during his lifetime?

A. I don't remember when I didn't know him. We were childhood playmates.

Q. And did you grow up together?

A. We grew up in Coos Bay together. We went to school together and played football together.

Q. Would you describe for the Court, Mr. Lyons' general physical characteristics and personality?

A. He was a rather small man, he was an extremely sturdy man physically and emotionally. He went into his things wholeheartedly and very vigorously, at no consideration of expense to his own health and well-being. [169]

Q. A hard-driving individual?

A. He was a very dynamic and very forceful individual.

Q. Now, Dr. McKeown, were you the family physician at Coos Bay for Mr. Lyons and his family for a period of years? A. I was, yes, sir.

Q. Did you have occasion to examine Mr. Lyons on numerous occasions?

(Testimony of Dr. Raymond M. McKeown.)

A. I examined him repeatedly.

Q. Now, Dr. McKeown, did you ever conduct any heart examination of Mr. Lyons?

A. Several times, I did, yes.

Q. Are there any particular ones that stand out in your memory?

A. None, because they were all normal.

Q. Did you examine him for a rather large life insurance policy some time in the 1940's?

A. I did, yes, sir.

Q. Did you give a heart examination in connection with that? A. Yes, sir, I did.

Q. At that time, did you give him exercise tolerance tests?

A. I gave him all the usual recommended tests used to find out heart disease and there were none.

Q. Specifically, Doctor, did you hear any heart murmur at that time?

A. There was no heart murmur at that time or at any time. [170]

Q. Did you listen both before and after exercise? A. I did, yes.

Q. And could detect no murmur?

A. Heard no murmur.

Q. Now, Dr. McKeown, in 1950 there was an occasion, was there not, when Mr. Lyons consulted you about pain in his chest radiating down his arm that occurred on a dock? A. There was.

Q. You recall that occasion?

A. Yes, I do, from memory. I believe he was walking across a deck of one of his boats and he

(Testimony of Dr. Raymond M. McKeown.)

experienced what he thought was a chest pain, as I recall, radiating down one of his arms, his right, I believe, and he became frightened and apprehensive, which he didn't become very often, and he came to see me shortly thereafter, and I subjected him to all the tests for heart disease, and they were all normal.

Q. Did you have an electrocardiogram taken or take one yourself?

A. I took one and it was read by Doctors Willis and Armstrong, Portland, and his return was normal electrocardiogram. I believe I had it typed out there, too.

Mr. Beebe: May we have this marked?

(Document was thereupon marked Plaintiff's Exhibit 17 for identification.)

Mr. Kriesien: I might say, this indicates 16. I believe [171] the chart was number 16, so far as my records are concerned.

Mr. Beebe: Yes, this should be 17, actually. We will offer in evidence, if the Court please, Plaintiff's Exhibit 17 for identification, which was heretofore shown to counsel and which is the cardio—electrocardiogram.

The Court: It will be received and marked.

(Document previously marked Plaintiff's Exhibit 17 for identification was thereupon received in evidence.)

Q. (By Mr. Beebe): Now, Dr. McKeown, when

(Testimony of Dr. Raymond M. McKeown.)

you examined Mr. Lyons on the occasion of the pain that he had while crossing the dock, was there a case history given you of being unable to hold the telephone?

A. He mentioned to me that the pain was such a nature that subsequently he could not even lift a telephone, and I went on then to tell him what I thought the cause of that was.

Q. Now, Doctor, at that time, did you give Mr. Lyons an exercise tolerance test and listen to his heart before and after the exercise?

A. Yes, sir, I did.

Q. And did you detect any heart murmur at that time?

A. No, sir, I did not.

Q. Either systolic or diastolic?

A. No murmur of any description.

Q. Now, what was your diagnosis of this chest pain which [172] took place at that time?

A. As I recall, intercostal neuralgia and anxiety tension state.

Q. Will you explain to the Court what you mean by intercostal neuritis?

A. Coming out of the spinal column and going around to the front of the body in between the ribs are nerves that are all the intercostal nerves. One can have in there, arthritis and other spinal conditions which produce pain and pressure on those nerves itself. Pain then radiates around to the front of the chest and the sides of the body and so on. It is frequently misinterpreted by patients in their his-

(Testimony of Dr. Raymond M. McKeown.)

tory, and it is actually pain from arthritis of the spine, which was true in this case.

Q. Now, after that occurrence, and—what do you mean by anxiety tension, Dr. McKeown, and what relation could that have to the intercostal neuritis?

A. Well, anxiety tension is, one might say, a rather ephermal sort of thing that one has when they become extremely worried, anxious, and upset, and they say, the doctors call it an anxiety tension state. In other words, the patient is anxious, they are under tension and they are frightened, usually, and worried, and the various little things that they have had all their lives become pretty tremendous to them, and they come to a doctor with heart disease and cancer and many other things. [173]

Q. What relation do you think the tension had to Mr. Lyons' chest pain on this occasion?

A. I felt that he had reached that stage in his life when he had accumulated enough worldly goods that he could slow down and look at himself for the first time in his life, and he didn't like the looks of it, and he was worried about his health, and when he felt this pain he thought he might have heart disease and he came running for reassurance.

Q. Now, Doctor, after that occasion, did you have further occasions to examine Mr. Lyons and treat Mr. Lyons?

A. I can't recall, that is definitely without examining my records, but I believe I saw him a couple—a number of times. I saw him shortly be-

(Testimony of Dr. Raymond M. McKeown.)

fore he went to Mexico on this last fishing trip, and he was in my office possibly a half to three-quarters of an hour seated across the desk from me discussing himself, his business, and his health and his future plans. He made no reference to this at that time, or any disability of his body, no reference. No reference of any heart condition or anything and was going on this trip to Mexico for a rest.

Q. Doctor, did you treat Mr. Lyons on the occasion of his automobile accident? A. I did, sir.

Q. And would you describe, just briefly to the Court, the injuries he sustained in that accident and sequela that he might have had? [174]

A. This was in January of 1950, he was driving home, as I recall, late in the morning on a very slippery highway, and took a curve coming into Coos Bay too fast, he struck the curb on the right-hand side and slid across to the left, his door on his side flew open and it knocked him out and he slid on the left side of his body a distance of some 20 or 30 feet, and finally rammed himself up against the curb. He was picked up and brought to the McConlly Hospital where I saw him almost immediately. He had a fractured nose, contusions and bruises about his body, he had fractured left ribs. I can't remember the exact number, I believe it was four and five, and then his left hip, there was a question originally about a fractured hip, but it was not found so on the X-ray. He was in mild shock and a pretty sick individual. I had our local eye, ear, nose and throat doctor, Dr. Barkwell, to take

(Testimony of Dr. Raymond M. McKeown.)

care of the fractured nose, it was set and put in splints and we put him in the McConlly and treated it systematically. He left there possibly ten days, I believe, more or less, later to fly down to his home in California. X-rays were taken, electrocardiograms were taken, various lab tests were taken and he showed quite a considerable shaking up, but by the time he left, he was in good shape.

Q. Did you see him for anything—after the time he went to Palm Springs—for anything that arose out of that accident, Dr. McKeown? [175]

A. Not offhand, no sequela, I remember he gradually recovered, and I believe he had, as I remember, a left hemothorax.

Q. What is that?

A. Which is blood between the—should I say the lung and the chest wall in the pleural cavity on the left-hand side. I thought that was quite likely due to this fractured rib, and he saw Dr. McBride in Palm Springs, and I believe he recovered from that without any after effects whatsoever.

Q. I think you may cross-examine.

Cross-Examination

By Mr. Kriesien:

Q. Dr. McKeown, I believe you stated that the anxiety tension state was the result of Mr. Lyons having slowed down; is that correct?

A. I don't think I used that term, sir, as I didn't mean it in that respect. What I meant, I

(Testimony of Dr. Raymond M. McKeown.)

had reference to was Mr. Lyons had finally climbed the hill, if you will, and secured enough security and enough worldly goods that for the first time in many, many years he had time on his hands to sit down and look at himself. Previously, he was an extremely busy individual, worked many, many hours a day, and did not pay any attention to anything.

Q. Now, you said that this intercostal neuralgia was the cause of this chest pain, I believe? [176]

A. That was my impression, yes.

Q. You said, I believe, it's true, that is the cause. Did you take X-rays of the spine and make that determination?

A. Yes, we have X-rays available of the entire body.

Q. At the time of this pain, did you take the X-rays and reach that opinion as a result of the examination of the X-rays? A. Yes, sir.

Q. That was your basis of your opinion at the time? A. They are available.

Q. Was it your opinion that Mr. Lyons had—had to be slowed down further than he was at that time, was he slowed down at all?

A. Yes. Well, yes, correct. We told him to take it easy and not worry so much.

Mr. Kriesien: May I have this marked for identification? We had better mark the entire file here.

Mr. Beebe: As a matter of fact, do you want Dr. McBride's record at this time, Mr. Kriesien?

Mr. Kriesien: Were these all furnished to me?

(Testimony of Dr. Raymond M. McKeown.)

Mr. Beebe: Yes, all of them. I don't know which ones, you thought, are material, everything but this last letter from Dr. McBride.

Mr. Kriesien: May I approach the witness, your Honor?

The Court: Yes, sir. [177]

The Clerk: Defendant's Exhibit 18.

(Documents were thereupon marked Defendant's Exhibit 18 for identification.)

Q. (By Mr. Kriesien): Doctor, did you inform Dr. William McBride of this occurrence in May of 1950? A. Of the accident of Lyons?

Q. No, of this chest pain.

A. I presume I did, you must have the record there.

Q. Well, I will hand you Exhibit Number 18, calling your attention to three handwritten notes on three sheets of paper of your letterhead and ask you if this is the letter that you wrote to Dr. McBride with reference to the occurrence in May of 1950 of the chest pain?

A. Yes, sir, that is my letter, I am glad to see it. I haven't seen it for a good many years.

Mr. Kriesien: We offer this in evidence, your Honor.

Mr. Beebe: No objection.

The Court: It will be received in evidence.

(Documents previously marked Defendant's Exhibit 18 for identification were thereupon received in evidence.)

(Testimony of Dr. Raymond M. McKeown.)

Q. (By Mr. Kriesien): Dr. McKeown, what was the reason for your advising that Mr. Lyons had to be slowed down?

A. For the same reason you take out a life insurance, you are not going to live to see the profit of it for long, in [178] other words, this boy if he kept on on the fast clip he was going at, something was going to happen, but I didn't know what.

Q. Then your recommendation was to prevent some ailment developing that might shorten or endanger his life? A. Certainly, yes.

Q. And what ailment did you have in mind, Dr. McKeown?

A. I didn't have any, sir; if I had I would have specified it in my letter to McBride.

Mr. Kriesien: That's all, Dr. McKeown.

Redirect Examination

By Mr. Beebe:

Q. Dr. McKeown, would you give the background of the history that you knew of Jim Lyons and describe what you meant by slowing down? In other words, you must have had something in mind, something that he had been doing that you wanted him to stop?

A. Well, I think that to be generalized, I was concerned at the time right up to his death with his whole pattern of living. Nothing in particular, but he was a typical example of a representative type of aggressive logger and lumberman that we have

(Testimony of Dr. Raymond M. McKeown.)

had in Coos Bay area for many, many years. I can cite other cases comparable to his where the same type of people and they had gone on over the years, accumulating their money by any means at their disposal, and so often had [179] never lived to reap the reward. They died for many different reasons, some from accidents, some from disease, and I didn't propose to see a man whom I always considered a young man, I did not propose to see him, a friend of mine, come to a bad end by any means that I could prevent, but I had nothing specific in mind. I just figured the pattern of his living, the pattern in which he conducted his business and his affairs was such that if he went at the same rate of speed he'd get himself into some kind of trouble.

Q. That would hurt him?

A. Well, I figured it most certainly would.

Q. And when you refer to the pattern of behavior, do you refer to a pattern of debauchery or do you refer simply to the drive and energy?

A. Well, I wouldn't attempt to reconcile any one thing, because each thing he did was typical of the type of person he was. The way he drank, the way he spent his money, was nothing more or less than what all the rest of them were doing in some things, maybe he did a little better job than the rest of them did, but it was all the same thing.

Mr. Beebe: That's all.

(Testimony of Dr. Raymond M. McKeown.)

Recross-Examination

By Mr. Kriesien:

Q. Doctor, one question; this type of drive and energy and tension that he was operating in, what is the most powerful [180] effect it would have on Mr. Lyons or the human body, that type of tension?

The Court: I think that calls for a great deal of speculation. In other words, Doctor, as I understand your testimony, the advice you gave to Mr. Lyons would be no different than you would make for any man of 48 years or 49 years of age who has, throughout his lifetime lived at a tremendous pace in a business way and in other ways. In other words, as a conservative doctor, you would give the same advice to me, for instance, if I came to you under similar circumstances; isn't that right?

The Witness: That's correct, sir. And I might add an observation, in my folder there is a communication from McBride, in which it says Palm Springs is filled with people like Jimmie Lyons and they have retired down there and are in poor health. If I might add that, sir.

The Court: All right. Is that all?

Mr. Kriesien: Nothing further.

The Court: You may be excused, Doctor.

(Witness excused.)

Mr. Beebe: Your Honor, I wonder if the Clerk has a clip or something. I have the whole of Dr.

McBride's record here, and we might as well put the whole medical record in, insofar as it is written. Would you mark all of those?

The Court: They may be marked. [181]

The Clerk: Plaintiff's Exhibit 19.

(Document was thereupon marked Plaintiff's Exhibit 19 for identification.)

Mr. Beebe: And 20.

(Document was thereupon marked Plaintiff's Exhibit 20 for identification.)

Mr. Beebe: We will show 19 to counsel, your Honor, and offer it in evidence, being Dr. McBride's office record.

The Court: It will be received.

(Document previously marked Plaintiff's Exhibit 19 for identification was thereupon received in evidence.)

Mr. Beebe: And 20, your Honor, being the electrocardiogram taken by Dr. McBride on February 24, 1953.

Mr. Kriesien: No objection.

The Court: It will also be received.

(Document previously marked Plaintiff's Exhibit 20 for identification was thereupon received in evidence.)

Mr. Beebe: Will you mark this?

The Clerk: Plaintiff's Exhibit 21.

(Document was thereupon marked Plaintiff's Exhibit 21 for identification.)

Mr. Kriesien: If the Court please, with reference to Plaintiff's Exhibit Number 21, the defendant will object to [182] the introduction on the ground and for the reason that it is not a record made in the course of the doctor's autopsy or inquest and was made at a later date, and bearing the date of the 21st day of February, 1953, and on the further ground that it merely contains a speculation as to the cause of death.

The Court: Pardon me, what does the document purport to be?

Mr. Beebe: That is a letter. It is a statement under the seal of the Delegacion Sanitaria of San Jose Del Cabo by Drs. Rodriguez and Serrano who conducted the autopsy, and they admit the scientific possibility of the shotgun explosion having something to do with the cause of death, and we offer it in evidence.

Mr. Maguire: That is prior to the time of the one that we made no objection to, when counsel went down personally and examined them.

Mr. Kriesien: It is our position that it is of no probative value, your Honor.

The Court: Well, I am going to allow it in evidence, it may mean something to me, and it may not. If it doesn't mean anything, I won't regard it.

(Document previously marked Plaintiff's Exhibit 21 for identification was thereupon received in evidence.) [183]

Mr. Beebe: You might just number these consecutively, beginning with that (indicating).

Mr. Maguire: Mr. Kriesien, I take it you will not want any further examination of Dr. McKeown?

Mr. Kriesien: No, sir.

The Court: You may be excused, Doctor, thank you.

(Witness excused.)

The Clerk: Plaintiff's Exhibits 22 to 37.

(Documents were thereupon marked Plaintiff's Exhibits 22 to 37, inclusive, for identification.)

Mr. Beebe: We offer Exhibits 22 through 37, inclusive, your Honor. They don't bear on any of the main issues. The only relevancy is, that if the plaintiff prevails, the date when interest would start to run, the negotiations between the companies and the formal proof of loss.

Mr. Kriesien: I object to them here upon the ground of their irrelevancy to any issue in this matter, your Honor.

The Court: Overruled. They may be received.

(Documents previously marked Plaintiff's Exhibits 22 to 37, inclusive, for identification, were thereupon received in evidence.)

Mr. Beebe: Perhaps I had better go ahead, Mr. Maguire, if I may be excused? [184]

The Court: Very well.

Mr. Beebe: Your Honor, I ran into Dr. Rush in the hall. There is one further question I might ask him and then we won't have to interrupt Dr.

Chamberlain. Will you resume the stand, Dr. Rush, please?

DR. HOMER P. RUSH

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Further Direct Examination

By Mr. Beebe:

Q. You have been sworn, Dr. Rush. You advised me at noon that you had made a mistake in answer to a question, you gave an incorrect answer?

A. I misunderstood your question, and——

Q. What question was it?

A. The question was when you asked me about the time element was between the time that I heard the second shot and the breathing.

Q. Of the beginning of the stertorous breathing?

A. That's right, I had in mind between the time I heard the breathing and when I started to walk back, and the time element would have to be some time longer than three or four seconds from the time I heard the second shot and when I heard the stertorous breathing. [185]

Q. How long would you estimate it was between the time you heard the second shot and when you heard the stertorous breathing?

A. At least 10 to 20 seconds. The other one, I was thinking of how long it would take to have the thought processes that was going on in my mind when I made the two-to-four estimate.

(Testimony of Dr. Homer P. Rush.)

Q. I see. Thank you, Dr. Rush. That is all I have now for Dr. Rush.

The Court: You let me know, gentlemen, when you are ready.

Mr. Maguire: He is coming, your Honor. [186]

DR. FRANCIS CHAMBERLAIN

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Further Direct Examination

By Mr. Maguire:

Q. You recalled this morning, Doctor, the factual matters which you observed on that trip and after this unfortunate tragedy; you have also heard, have you not, Dr. Rush's testimony?

A. Yes, sir.

Q. As to what had taken place. Dr. Rush just a moment ago, while you were out of the courtroom, corrected his testimony as to the length of time between the second shot or the last shot, rather, with the shotgun and the time when he first heard the stertorous breathing, from 10 to 20 seconds. He has so testified he had misunderstood the question this morning where he said three to four seconds that he was referring to the time that he heard the stertorous breathing and wondered what was going on.

Now, I wonder if—well, first strike that. What significance is there in the presence of atheromatous

(Testimony of Dr. Francis Chamberlain.)

plaques and a thickened aortic bicuspid or semi-lunar, rather, valves and as described in the autopsy so far as the capacity of the person having that condition to proceed along in the ordinary affairs of life to reach or exceed his life expectancy [187] or is a thing like that indicative of a sudden or early death?

Mr. Mize: If the Court please, I will object to that question as calling for an opinion of a witness on a subject matter that is not before this Court and not even concerned in this particular case.

The Court: I might say, I would like you to rephrase it a little better, Mr. Maguire, if you can, I didn't understand it myself.

Mr. Maguire: You would like me to rephrase it?

The Court: Yes.

Mr. Maguire: Well, the testimony in this case is that the deceased, James Lyons, upon autopsy, was found to have atheromatous, if that is the proper pronounciation, plaques on the arteries of the heart, the coronary arteries, that the semilunar valves of the aorata were somewhat thickened and hardened and that the same kind of plaques were found. There was nothing shown in the autopsy of either a coronary occlusion or a coronary thrombus. The autopsy merely revealed the fact that the caliber of the coronary had been reduced. What I wanted to ask you, is whether that condition so stated would in itself be any indication that the person who had that condition be any indication that the person who had that condition would have his life short-

(Testimony of Dr. Francis Chamberlain.)

ened or that he was in a situation where an early death from those conditions might be expected.

Mr. Mize: If the Court please, I objected to it as [188] propounded by Mr. Maguire on the ground that he used the words with reference to the semi-lunar valves that they were somewhat thickened and hardened, and such a finding is not incorporated in the autopsy report. The autopsy report said a thickening and stiffening of the aortical sigmoids with atheromatic deposits. On the further ground that the question of the shortening of life expectancy of a man by reason of this condition existing in a man, is not in issue in this case. The question in this case is what, if anything, was the cause of the death of the assured.

The Court: Overruled. You may answer the question, Doctor, if you understand it.

The Witness: Yes, I believe I understand it. I should like to say that atherosclerotic plaques in the aortic valves do not constitute a situation which would shorten a patient's life or put undue stress on the patient's heart, unless there are physical findings on a medical examination to show that they are of extreme degree. The main physical findings are a heart murmur, to have a derangement of the aortic valves without producing any heart murmur whatsoever, I don't feel would compromise the efficiency of the heart to any important degree.

Q. (By Mr. Maguire): Now, what does the fact that there was an absence of heart murmur, either

(Testimony of Dr. Francis Chamberlain.)

systolic or diastolic; what significance does that have in your judgment? [189]

Mr. Kriesien: Object to that question on the ground and for the reason that there is no evidence in this case that he did not have such a murmur except back in the year in May of 1950.

The Court: Overruled.

The Witness: Might I have your question again, I am sorry?

The Court: Will you read it, Mr. Reporter?

(Question read.)

The Witness: Well, I think that's the crux of the matter, because in the autopsy report they didn't mention anything about degree. They said there was some stiffening or some deposits and the heart in the average individual in this age group would certainly have some atheromatous deposits in various parts of the circulation, but if they are of significant degree, one then gets the clinical counterpart, that if they are of significant degree, there also is a heart murmur which corresponds in fact to these atherosclerotic deposits on the aortic valve, usually cause a critical condition if they are in extreme degree, not like the autopsy conclusion there of aortic insufficiency, but aortic stenosis, which stenosis bring about the heart murmur, that frequently in our medical findings is so loud you can hear it outside the chest wall.

Q. (By Mr. Maguire): When you speak of a stenosis, what do [190] you mean?

(Testimony of Dr. Francis Chamberlain.)

A. A narrowing of the valve.

Q. And there is in evidence here the notes and record as well as the deposition of Dr. McBride, and I believe you have read Dr. McBride's deposition; have you not? A. Yes, sir.

Q. That he not only took E.K.G.'s but he also gave the exercise tolerance tests, and that all of these were within normal limits, I believe he said.

A. I read that report recently.

Q. Now, would the presence of either a systolic or diastolic murmur be, if that existed, would you say the heart was acting and/or behaving within normal limits?

Mr. Kriesien: If the Court please, I will object on the ground that I heretofore objected and on the further ground that it is asking this witness to give an opinion on an opinion of another doctor.

The Court: Overrule the objection.

The Witness: I am sorry, sir, would you read that again?

(Question read.)

The Witness: Not if there was a diastolic murmur, for example, some types of systolic murmurs are unimportant, but some of them are very important.

Q. (By Mr. Maguire): Well, would you say that the presence or absence of a systolic or diastolic murmur was what is [191] called an objective symptom?

Mr. Kriesien: If the Court please, I object to

(Testimony of Dr. Francis Chamberlain.)

the question on the ground that there is no evidence of the absence of this, and so if I may have a continuing objection, your Honor?

The Court: Yes. Overruled.

The Witness: The absence of a murmur can be taken as evidence. The absence of a murmur in connection with the aortic valve can be taken as evidence that the aortic valve is doing to good functional job.

Q. (By Mr. Maguire): Would the presence of any such murmur be an objective symptom in medical terminology?

A. Would the presence of a murmur be—you mean, a sign, you are referring to?

Q. Yes.

A. Not any murmur. Some murmurs are important and some aren't. But the presence of any diastolic murmur would be a sign of important disease of the aortic valve. The presence of loud—of some types of systolic murmurs would be evidence of disease.

Q. Have you examined the E.K.G.'s—may I approach the Clerk's desk, your Honor? Doctor, have you examined the E.K.G.'s which are in evidence here as Exhibit 17 and Exhibit 20, the first being an E.K.G. taken in February—on February 17, 1950, and the other on February 4, 1953?

A. I believe so. I'd like to—I have seen the previous [192] electrocardiograph which I guess was this one. I'd like to review it in a little more detail; yes, sir, I have reviewed them now.

(Testimony of Dr. Francis Chamberlain.)

Q. What do those electrocardiograms—first, take Number 17—what does that indicate as to whether or not the heart action is as shown there, does it indicate any diseased condition?

A. You mean Number 17?

Q. Yes, 17.

A. The one that was taken February 17, 1950?

Q. Yes.

A. This is a normal electrocardiogram. I might preface this by saying that there is a technical imperfection here that the one that corresponds—the doctor had the arm electrode crossed, which one can see on the inversion of the P wave in the first lead, so that knowing that, there is a technical abnormality, I mean a technical defect in the way the record was taken, which we can, or which I can be a hundred per cent sure that this is a perfectly normal electrocardiogram, and I say that in spite of the technical defect, it is quite a normal record.

Q. It is in evidence, Doctor, that shortly before, in fact two days before Mr. Lyons started to go on this trip, that Dr. McBride prescribed and gave him nitroglycerin and you heard Mrs. Lyons' testimony about the fact that he had a pain—complained of a pain during the night? [193]

A. She said in the evening.

Q. In the evening, yes. Now, what is the significance of that, first, having nitroglycerin prescribed?

A. Nitroglycerin is most commonly used to relieve the chest pain which is associated with coronary heart disease. However, I have major cause to

(Testimony of Dr. Francis Chamberlain.)

believe that that was not the reason for which it was given in this case. Because I have observed the doctor's record, and because the doctor——

Mr. Kriesien: If the Court please, I will move that that answer be stricken unless the records are referred to and the witness gives the facts upon which he predicates his answer.

The Court: Do we have those records available?

Mr. Maguire: Yes, oh, yes, sir, they are in evidence, your Honor.

Mr. Beebe: May I help you, Mr. Maguire, they are in two parts, because they came in separately. It is two parts; I am handing the Exhibits 18 and 19 to the witness (handing documents to witness.)

The Witness: May I read from the record?

Mr. Maguire: Yes, surely.

The Witness: The record is dated February 4, 1953. This is Dr. McBride's office record. "Has had an attack of chest pain yesterday and today, constriction in chest with radiation down arms. I guess it is fluoroscopic E.K.G. not diagnostic. [194] Sed rate"—I think it looks like "O.K. Also W.B.C. and uric acid. R.X. nitroglycerin 1/200 on onset of pain, may need Thaverine," or something like that, which I understand is some type of vitamin, and then on the next date he says, "Pain some improved. Advised to go fishing." And then there was a subsequent letter, I believe from this same doctor where he described—or was it deposition that he made—a letter from him wherein he described his findings

(Testimony of Dr. Francis Chamberlain.)

stating that he felt that this represented fatigue, which I don't have here.

Q. (By Mr. Maguire): That is not in evidence, Doctor. You can't consider it, it is not in evidence.

A. I see, but I should say with respect to nitroglycerin, that we give nitroglycerin to patient's with three purposes in mind. One is to relieve heart pain, the second most common use is to find out—to try to find out if a given pain is from the heart or whether it might be from the other cause which we have to—we are called on most commonly to determine, and that is fatigue, so we prescribe this nitroglycerin, and say, if you get this pain again, take the nitroglycerin at the onset, and come back and tell us if it relieves it or not, and so it is also a diagnostic test. The third is that it relieves some types of indigestion not related to the heart.

Q. What significance is there, Doctor, that this heart pain [195] which he complained or told Dr. McBride about and the type of occurrence he told his wife and it took place in the evening before going to bed, and after going to bed, and can you say whether it was an anginal pain or whether it was something else?

A. I think that may be quite important, because the pain of angina or the pain of a true coronary heart disease, which we know of as angina, comes on while the heart is carrying on a peak of effort. It's during intercourse, during excitement, during anger. While he is climbing the steepest part of a hill rapidly; while he is lifting something heavy;

(Testimony of Dr. Francis Chamberlain.)

while he is carrying on the peak of exertion, not some time afterward, which is the way it appears, which is related to fatigue, to a person who is exhausted from emotional or physical causes. That pain is in the chest and it is often also radiated down the arm. That pain comes on usually at the end of a day when a person is tired. In other phases, it is part of a fatigue in the way of a headache or backache, he gets a chest ache or something and the evening is the commonest time for that pain to appear for the first time.

Q. You have been in the courtroom, have you not, Doctor, while all the testimony has been given with respect to Mr. Lyons' activity, his physical condition, his drive, his life work and matters of that kind, have you not, and you also heard the testimony of Dr. Rush as to what took place [196] as he observed while you were on the fishing trip up to and including the time of the catastrophe?

A. Yes, sir.

Q. And of course you have in mind your own observations and you have in mind the autopsy findings of the physical condition? A. Yes, sir.

Q. Bearing all these matters in mind, Doctor, what in your opinion was the cause of the death of James A. Lyons?

Mr. Kriesien: If the Court please, I do not believe that question incorporated the facts on which this opinion is being predicated. For that reason, I will object to it.

The Court: Overruled.

(Testimony of Dr. Francis Chamberlain.)

The Witness: May I preface that? You are asking me my opinion of the death and so on. I would like to call attention to one point about the autopsy which I felt my answer is based in part on, and that is that the autopsy conclusion was that this man died from aortic insufficiency. This is at variance with the description that the autopsy surgeon made of the heart. It is also at variance with the clinical observation made prior to this man's death to the effect that he had no murmurs, so I should like to state that first, as getting a little background of my opinion, if aortic insufficiency which the autopsy performed—I mean the autopsy conclusions stated this man was thought to have died from was not [197] described in it at all in the body of the autopsy. Furthermore, the aortic insufficiency, the two great causes and nearly all of the first causes of aortic insufficiency are syphilis in the artery, which is not present in this man, and rheumatic heart disease, with distortion, deformity of the valves due to rheumatic processes, which again the autopsy surgeon did not describe. Therefore, I concluded that their final conclusion is in error and that there is no evidence for aortic insufficiency in this patient. Now, I'd like to also say—well, I think that's enough of my preamble. Yes, sir, I'd like to say, from the autopsy findings, that the amount of arteriosclerosis described, or the atheromatous plaques in this man's coronary disease from their description, their description is rather nebulous. There is some atherosclerotic plaques. There was not an occlusion. I would like to say that the amount of atherosclerosis in the aorta

(Testimony of Dr. Francis Chamberlain.)

which these men described does not impress me as necessarily being of importance to our—I should say abnormal for a man of this age group, since nearly all men 49 years of age have atherosclerotic deposits in their coronary vessels, so that I don't feel that any description unnecessarily beyond what the average man that age has has been described. I would further like to state that this man's death was no ordinary death. I thought of course immediately that he died of gunshot wounds that had gone from his face up to his brain. [198]

Mr. Kriesien: If the Court please, I would like to move that the answer of the witness be stricken as not responsive to the question propounded.

The Court: It may go out on that ground.

Mr. Beebe: The entire answer, your Honor?

The Court: Yes, it may go out and he can start over again.

Mr. Maguire: Your Honor, I didn't know counsel objected to the phrase that this is not an ordinary death—

Mr. Kriesien: No, I objected to the entire answer, asking that it be stricken.

The Court: He objected to the entire answer and I struck the entire answer. I think you should start over again.

Q. (By Mr. Maguire): I see. Now, referring to the autopsy itself, Doctor, there are certain conclusions in regard to the possible cause of death. I will read them, and I believe you stated you are familiar with the findings as shown in the autopsy here?

(Testimony of Dr. Francis Chamberlain.)

A. Yes, with the findings of the autopsy.

Q. Yes. Now, it is considered, as the direct cause of death, aortic insufficiency probably brought about the acute cardiac failure. In your experience and in your opinion, Doctor, in view of the physical findings shown on the autopsy could and would aortic insufficiency be the cause of an acute cardiac failure?

Mr. Kriesien: Your Honor, I object to that question on [199] the ground that it is based—calls for the opinion of this witness on the opinion of some other doctor, and does not contain all the facts in evidence.

The Court: Well now, counsel, I will tell you. If you were trying this case before a jury, I would sustain the objection. But I am taking this position in the trial of this case, I want every bit of information I can get that will help and aid and assist me in deciding it, and for that reason and that reason alone, I am going to overrule the objection.

Mr. Mize: If your Honor please——

The Court: That's all. It is your duty to preserve your record.

Mr. Mize: In order to preserve our record.

The Court: You may answer the question.

The Witness: Yes. You are asking if——

Q. (By Mr. Maguire): In view of the physical findings set forth in the autopsy, in your opinion, aortic insufficiency existed?

A. No, I don't feel that the autopsy shows the presence of aortic insufficiency.

(Testimony of Dr. Francis Chamberlain.)

Q. And that—for what reason?

A. For the reason that the description of the aortic valve was that of atherosclerotic plaques causing some stiffening. I think the words were, “of the valves,” that atherosclerosis is [200] not one of the causes of aortic insufficiency, that the two great causes are rheumatic heart disease and syphilitic heart disease, which are not described here, and I should like to further advise here that atherosclerosis occasionally can cause aortic insufficiency of a very slight relatively unimportant degree, if the patient, at the same time, has high blood pressure.

Q. Did Mr. Lyons have high blood pressure?

A. No, sir, not according to the record. The blood pressure reports I have seen were normal.

Mr. Mize: Are you referring to Dr. McBride's reports?

The Witness: Yes, I am referring to Dr. McBride's records, and I am sure there are blood pressure reports of Dr. McKeown.

Mr. Mize: Well now, if your Honor please, I move to strike the answer from the record as to the blood pressure. I think he can testify from any records as to a particular time what this man's blood pressure was, but I think we all realize that blood pressure can vary in certain circumstances.

The Court: Motion granted.

Mr. Maguire: Well then, just limit—your Honor, I take it you are objecting to McKeown's, not the one made by Dr. McBride?

Mr. Mize: I stated my objection, read it back.

(Testimony of Dr. Francis Chamberlain.)

Mr. Maguire: Well, I didn't want to ask the question—I will ask you, from the records of the blood pressure tests made by Dr. McBride on the date, I believe was February 4th, [201] disclose any high blood pressure?

Mr. Mize: I object to that, your Honor, on the ground that the records of Dr. McBride speak for themselves.

The Court: That is correct. Sustained.

Q. (By Mr. Maguire): Very well. May I have that record? Will you examine Exhibit Number 18, Doctor, and note the pages and time where blood pressure is shown?

A. Yes, February 1, 1950.

Q. Well, wait a minute. Did that—is that Dr. McBride's? A. Yes, this is Dr. McBride's.

Q. Can you find any blood pressure record made by other persons? You can use that.

A. There is one of 146 over 76 described February 1, 1950.

Q. (By Mr. Maguire): How would you characterize that blood pressure as to whether it is normal, above normal, or below normal?

A. It's within the normal range.

Q. I hand you one here for—

A. January 25, 1951, blood pressure 120 over 80.

Q. What can you state as to whether or not that is high, low, or normal?

A. That's within the normal range.

Q. Can you find any further ones in these?

A. Pardon me?

(Testimony of Dr. Francis Chamberlain.)

Q. Did you find any further blood pressure records in there? [202] A. I didn't notice any.

Mr. Beebe: Here is another one, Mr. Maguire.

Mr. Mize: Your Honor, I move that the answer to this question as to the condition of the blood pressure in 1950 and '51 be stricken from the record on the ground that it is immaterial and does not prove or disprove the condition of this man's blood pressure on the day it occurred.

The Court: I don't think the case is going to be decided on that. I don't see any harm in letting it in the record. Motion denied.

Q. (By Mr. Maguire): I hand you now a medical record which apparently is of December 31, 1952. Can you find any record there of blood pressure?

A. Yes, December 31, 1952, blood pressure 142 over 80 in the left arm and in the right arm 124 over 80.

Q. What can you say as to the range of that?

A. Those are both within the normal range.

Q. Is there anything abnormal with the fact that one arm showed a little higher blood pressure than the other?

A. Not necessarily. The arm in which the blood pressure is first taken usually is apt to have a higher blood pressure than the other.

Q. I also note, Doctor, that the blood pressure taken on May 12, 1950, by Dr. McKeown discloses 142 over 80. Is that within normal limits? [203]

A. Yes, sir.

Q. And finally, I note further that on—now,

(Testimony of Dr. Francis Chamberlain.)

Doctor, I will ask you to state whether or not—what in your opinion from your personal observation of the history given of Mr. Lyons' health, the medical records; the testimony of Dr. Rush as to what he saw, what in your opinion was the cause of his death, Mr. Lyons' death?

Mr. Kriesien: If the Court please, object to that on the ground and for the reason that it again requires this witness to base his opinion upon the opinion of others. It does not limit the opinion to number one, the facts that this man observed and the findings of the autopsy report which are the only things that this individual is qualified to render an opinion from.

The Court: I think that is what we are trying to find out here as to what caused his death. I am going to allow the doctor to answer.

The Witness: I have examined all the facts and it is my belief from the examination of these facts that this man died as a result of the gunshot wound to the face.

Mr. Kriesien: If it please the Court, we move to strike that testimony from the record. That is not the cause of death but would be the precipitating cause of death and there is no evidence in this case that the man died as a result of the gunshot wounds.

The Court: I will overrule the objection.

Q. (By Mr. Maguire): Why did you say that that was the cause of death, what did it do, in your opinion?

A. I think that the gunshot caused Mr. Lyons

(Testimony of Dr. Francis Chamberlain.)

suddenly to have pain. He was startled. The usual reaction is one of anguish, as well and that these things then create the clinical condition which we refer to as "shock." I think that—so that I think they produce shock at the same time I feel that the patient—that the gunshot wound was the direct cause of his heart developing an unusual abnormal rhythm.

Mr. Mize: Just a moment, I'd like to move to strike that answer on the ground that the witness stated that "I think they produced shock," he does not state that in all probability they produced shock.

The Court: Well. I am going to deny the motion. Now, Doctor, this man Mr. Lyons was an experienced woodsman and hunter as has been testified to here. How do you account for the fact that the mere discharge of a shotgun would so disturb the function of his heart and rhythm that it would cause his death unless there was some pre-existing condition there which was present at the time of the firing of the shot?

The Witness: Well a man like—such as this—who was an experienced hunter who had a gun go off in his face, this is emotionally in my opinion, apt to be much more shocking than some greenhorn. This man had prided himself and he had [205] so told me. I wasn't asked, but I should be glad to mention it. in the course of the earlier discussion I mentioned that he and I spent a good deal of time talking about children and having them brought up

(Testimony of Dr. Francis Chamberlain.)

by women, and that is his main thought in this respect was to see that his only son was taught to be an experienced hunter, and that in spite of various objections from the feminine side, that he had been able to convince everybody that this boy should be taught to be a hunter, that this was a man's sport, that it could be done in complete safety. I think that probably means that his foundation of his consciousness of what was right or wrong, good or bad, perhaps was such, I think, that to him would be a greater shock than I, as a once-in-a-while hunter. I would think that that was one factor in contributing. I also felt from the observation I made of his face, certainly he received—there was evidence on his face of a good deal of trauma, I assume from the gun, that the man must have had a good deal of pain. Now, hearts, though such an instrument which is normal can develop abnormal rhythms it is true, they are more apt to develop abnormal rhythms in the heart as a result of some underlying disease. My feeling that the man had an abnormal rhythm is based on two or three unusual facts. One of these is that Dr. Rush, who was an experienced observer, who was this man, has told the Court that he felt a purring on this man's chest; a purring on a man's chest is a very unusual finding to observe when a man is unconscious, and [206] the usual cause of the purring sensation on a man's chest, when he is entirely unconscious, providing the purring sensation did not pre-exist, is an unusual type of heart rhythm which we refer to as ventricular fibrillation

(Testimony of Dr. Francis Chamberlain.)

or ventricular flutter, that is the purring sensation, then I think, as I have stated earlier, as I mentioned earlier, this was no ordinary type of death, because that man—I should say that usually when a heart stops suddenly, and I have seen it happen many, many times in my work—when a heart stops suddenly there is a short period of time, a few seconds, and then a patient develops the stertorous snoring type of breathing. The stertorous snoring type of breathing usually lasts a period of a half minute or less. This stertorous type of breathing in this man continued for a long time. This continued, Dr. Rush described, for a good many minutes. I have another reason—may I go on? I have another reason for believing that this was a rhythm of this type, and that is that this man who previously demonstrated no signs of heart failure, even though we observed him and were with him constantly, that this man showed something else which was unusual, and that was that Dr. Rush described two or three minutes after he had watched him with this stertorous type of breathing, the foam and then pink-tinged foam appeared at the mouth, and even the Mexican autopsy report stated the man had signs of congestion in his lungs, and congestion in [207] his liver.

Now, a man whose heart suddenly stops does not develop manifestations of congestive heart failure in a half minute. It takes at least a few minutes to develop. Furthermore, there was evidence brought out by Dr. Lehman this morning that there was in-

(Testimony of Dr. Francis Chamberlain.)

duration, swelling around the lacerations on his face, which don't occur momentarily, but take a matter of a few minutes to develop. For all those reasons then, I believe that this was not an ordinary death. That the gunshot touched off some unusual heart rhythm, that is the ventricular fibrillation, or perhaps a combination of these two or another rhythm which I have observed, and which may occur is what we call the ventricular tachicardia where the heart beats very rapidly at the rate of about 300 a minute, much too fast to have sufficient filling to be able to drive blood to the brain sufficient to let a patient maintain consciousness or to nourish the brain and yet sufficient to produce that purring sensation and allow life to be maintained for a longer time than usual, so for all these reasons I think that that suggested an unusual mechanism must be called in which is the only explanation that I can make in this particular case.

Mr. Kriesien: If the Court please, I move to strike the entire answer of the witness on the ground and for the reason that it was not responsive to the question propounded by the [208] counsel.

The Court: The motion is denied. We will take a short recess.

(A short recess was had.)

The Court: Proceed.

Mr. Mize: May it please the Court, I would like to state another ground for our objection to the last question, if I may, a recess came in between here.

(Testimony of Dr. Francis Chamberlain.)

I wish to object further to the answer of the doctor and move that the same be stricken as well as those answers concerning which he testified as to his opinion as to the cause of this death on the ground and for the reason that his opinion could only be based on a hypothetical set of facts which are in evidence and for the further reason that the doctor is assuming one particular fact which is not in evidence and that is the shotgun was discharged prior to the time that this man had a heart attack, and I would like to have that objection shown in connection with all of his answers in connection to his opinion as to the cause of death.

The Court: The objection will be noted in the record and be overruled for the reasons I have previously stated.

Mr. Maguire: Your Honor, I think I should make a statement, this is the third week that I have been in court every day on other cases, and Monday of this week, we had a full day's hearing before Judge McColloch. The only reason I [209] took to examine the doctor, because Mr. Beebe prepared all that, because I had part in the matter of the crux of the thing that he saw, and I want to confess to your Honor that it is very difficult for me to take the technical matters because of over tension, and Mr. Beebe is prepared, and in addition to that, I want to say this to your Honor, I would have stayed home because of extreme exhaustion, and I would crave your Honor's indulgence, that Mr. Beebe pre-

(Testimony of Dr. Francis Chamberlain.)

pared this part of the case, that Mr. Beebe take on this part of the case.

The Court: Do you have any objection?

Mr. Kriesien: No objection.

The Court: All right.

Further Direct Examination

By Mr. Beebe:

Q. Doctor Chamberlain, what is meant by a heart murmur?

A. A heart murmur is a whirring, buzzing sort of a sound which one hears in a stethoscope over—usually best over the area of the heart from which the sound originates.

Q. And what is a thrill?

A. A thrill is something—is a vibration of the chest wall which one can feel with his hands under circumstances where there is an unusually large murmur. In other words, it's not only loud enough or forceful enough to make vibrations in it, but one can feel it with the hands, so that a very loud murmur is—or a thrill is also associated with [210] a very loud murmur.

Q. And you might say then, a thrill is a palpable murmur, one that you don't have to have a stethoscope to detect; is that correct?

A. Yes, that's correct.

Q. And occasionally—and what is a symptom in medical terminology?

(Testimony of Dr. Francis Chamberlain.)

A. A symptom is something which a patient feels or perceives. Something which the patient perceives I suppose is the best.

Q. In other words, a symptom is something a patient would include in his subjective complaints; is that right?

A. That's right, they may be important or unimportant. It is something which he perceives or which a patient is aware of with respect that it is something of some sensation in his body.

Q. An objective symptom is one that can be seen by the doctor; is that correct?

A. It's sort of a misnomer and an objective finding is something which we call those findings which the doctor would have to perceive through any of his senses, the stethoscope, the eyes, the hands, or those that are objective manifestations of disease.

Q. Now, Doctor, can the heart beat and there be an absence of sense of pulse?

A. Yes. If the heart beats ineffectively there may be an [211] absence of pulse at the wrist or out in the periphery. In other words, especially if the heart beats very rapidly, the heart does not have long enough to fill. It only stops long enough between beats to fill so that when it then beats it only drives a column of blood out, a relatively solid and effective column of blood, a short distance or drives at a head pressure that one can perceive by putting his hand at the wrist or foot or neck.

Q. Is it possible for the heart to beat and not put out enough blood for nourishment?

(Testimony of Dr. Francis Chamberlain.)

A. Yes.

Q. Would that occur in a situation where you had a heart beat but no pulse?

A. Yes, that certainly could.

Q. Now, Doctor, are there many different types of heart rhythms?

A. Yes, sir, there are.

Q. Now, Doctor, what, in medical science, is the pain of angina pectoris?

A. The pain of angina pectoris is more commonly a pressure sensation than a pain, which usually includes the mid-line of the chest, but which may occur—may be perceived on the chest, jaws, arms, back. There is a variety of locations and occurring usually while a heart is called on to carry a peak load due to inadequate blood supply to the heart muscle [212] and lasting—if the effort is stopped or if the predisposing cause is stopped so that the patient suddenly stands still and stops climbing the hill, the pain usually disappears in a matter of two or three minutes.

Q. What is the pain of true coronary heart disease; how would you describe it?

A. That's what I have been describing, the pain of angina pectoris is indication of true coronary heart disease. There are two big broad subdivisions of coronary heart pain. One is where it cannot clear itself, and angina pectoris is where there is suddenly a big demand of the heart for blood which isn't forthcoming due to some transient affair and the other big subdivision of coronary heart pain is

(Testimony of Dr. Francis Chamberlain.)

where a coronary occlusion, a coronary thrombosis, occurs where the heart muscle itself suddenly drives ahead, where there is a long episode of pain of a half an hour to two or three hours after or in the course of which pain a lot of the patient's heart muscle dies.

Q. Is there any other significant type of heart pain other than which you have described?

A. Of heart pain?

Q. Yes, actual pains from coronary disease of one kind or another?

A. No, those are the two big manifestations of pain in coronary heart disease. [213]

Q. What is cause of pain in the arm when there is an attack of angina pectoris?

A. The cause of this pain is the fact that the patient has given his heart a big load to carry for which it cannot get sufficient blood, by virtue of the things mentioned, usually it's because of occlusion, actually, of several branches. Coronary arteries, it has been shown for example.

Q. What do you mean by "occlusion," Doctor?

A. Closure. It's been shown by Slessenger and Bloomgard, some 15 years ago, as a lot of our concept about this, that before a patient gets heart pain he usually has occlusion or complete plugging of at least two and in the average three major branches of his coronary blood supply.

Q. Now, Doctor, is a weakness in the arms or an inability to lift or hold a small object such as a telephone during an attack of chest pain radiating

(Testimony of Dr. Francis Chamberlain.)

down the arm, is that indicative of angina pectoris pain?

A. No, not at all, because if the pain from angina pectoris radiates down the arms wherever the pain originates, it will radiate down that part of the sensory nerve, not the motor nerve. There is no weakness whatever in the part of the body which the pain or pressure sensation may be radiated to, nor is there aggravation of a pain by movement of that affected member.

Q. Now, Doctor, what is meant by the—no strike that. [214] In your experience, to what is the greatest percentage of chest pain complaints referable; to some kind of heart disease or ailment?

A. No, far and away the greatest—the highest incidents of pain that I, as a heart specialist, see is the pain which is complained of as a manifestation of fatigue, rather than the pain of true heart disease.

Q. And what is the immediate cause of that pain, other than the tiredness; I mean what is the factor that brings about the pain?

A. The physiological factors are disputed, and there are probably several different factors that may enter in, one of them is the matter of arthritis of the spine, which causes irritation of various nerves, and radiates from the spine and it's assumed that under circumstances of fatigue, these nerves which are constantly irritated to some degree when a person is tired, that the threshold is exceeded and that those nerves become painful. A mechanism is one

(Testimony of Dr. Francis Chamberlain.)

wherein some intelligent introspective individual is told you may have trouble with your heart, your father died from that, or your next-door neighbor dropped dead from that, so that an intelligent person will say, I will watch that, I want to be sure that I am all right, and by that method of concentrating on this particular part of the particular individual in the meantime, that individual over a period of time, begins to develop [215] pain, and we think that by this mechanism of intelligence, of awareness of this part of the anatomy, that he has developed and gotten steamed up and sensitive, so that when the particular individual, instead of getting tired and having a headache, he gets tired and has a chest ache.

Q. Now, Doctor, if there is an aortical insufficiency, are there signs that a doctor can see in the man? A. Yes.

Q. What are those signs?

A. If there is an important degree of aortic insufficiency, merely observing a patient, as you and I are sitting across from each other, the throat bare, for example, one can see the neck pulsating and the great vessels in the neck, and one can diagnose, that is if a person doesn't have a necktie on, can judge very often by merely watching the blood vessels, the big blood vessels, big arteries in the neck pulsate much more actively than usual.

Q. Would those signs be more obvious say, if you saw a man that had participated in a strenuous exercise? A. Yes, they can.

(Testimony of Dr. Francis Chamberlain.)

Q. Did you think Mr. Lyons—did he wear an open-neck shirt? A. Yes, sir.

Q. Did you see any such signs?

A. No, sir.

Q. Now, Doctor, you testified a few moments ago that on a [216] question of acute coronary insufficiency or significant coronary insufficiency, I believe, that the presence of atheromatic deposits on the aortical or semilunar valves would not be significant unless it was accompanied by high blood pressure and hypertension; have I correctly restated your testimony?

A. I said that aortic insufficiency as a result of arteriosclerosis or atherosclerosis, would not be expected to occur except in the presence of hypertension.

Q. Now, what kind of hypertension do you refer to, Doctor, when you refer to where it is high one moment and down the next?

A. No, one would expect it to be associated with a sustained hypertension and usually one of moderate or severe degree.

Q. And has that been your experience, Doctor, in your practice of the profession?

A. Yes, seven per cent of severe hypertension are known in the literature to develop some degree of aortic insufficiency as evidenced by heart murmur and substantiated usually at autopsy findings to the fact that the heart valve or aortic valve is somewhat dilated.

Q. Are you finished?

(Testimony of Dr. Francis Chamberlain.)

A. I—yes, I was going to say that nearly always that type of aortic insufficiency which is a result of that condition is not a severe degree and usually it's only severe [217] enough to produce a murmur and it is not a great load on the heart. It isn't considered to be an important burden.

Q. Now, Doctor, where there is a death from an acute attack of coronary insufficiency, is that, in your experience, a sudden death, or are there evidence of—or do evidence—perhaps, I had better state it this way: In a death from acute coronary insufficiency, I mean acute aortic insufficiency, is that, in your experience, a sudden death?

A. No. Of aortic stenosis of a severe degree, 20 per cent die suddenly, but aortic insufficiency is not one of the common predisposing factors to sudden death.

Q. Now, Doctor, from the autopsy report here and from Mr. Lyons' clinical history, and incidentally, Doctor, any questions I ask you concerning the medical history, I do not want you to take into account any opinions as distinguished with medical facts which have been made by other doctors.

A. I don't believe I have taken any opinions.

Q. No, disregard any other expert's opinion, take in account only facts and medical facts as distinguished from opinions. Now, Doctor, in the medical or in the autopsy report is there any physical findings indicating that there was any aortic stenosis in Mr. James A. Lyons?

(Testimony of Dr. Francis Chamberlain.)

Mr. Mize: Objected to, your Honor, the autopsy report speaks for itself. [218]

The Court: Overruled.

The Witness: I don't think so. The autopsy report mentions some stiffening of the aortic valve leaflets, the sigmoid valve leaflets due to atheromatous deposits. In aortic stenosis, there is a terrific thickening of the valves to the point where the aortic—the opening in the aortic valve is very strikingly reduced. None of those things have been mentioned here.

Q. And what is the cause of aortic stenosis?

A. The commonest cause is rheumatic fever which is damage to the valve in youth and then there is another group of individuals in which calcium deposits all around the valve and which is referred to as calcareous aortic stenosis, but they fall into that particular group—those two groups, rheumatic fever and calcareous.

Q. Now, Doctor, in a death from coronary insufficiency, how does that occur, over a period of time? How much time would that take to occur?

A. The death from acute coronary insufficiency?

Q. I beg your pardon, I mean aortic insufficiency; did I say coronary?

A. If aortic insufficiency causes death, the mechanism is not one of sudden death, the mechanism is usually one of heart failure which usually takes—lasts a matter of two months to two years, so that there are manifestations of heart failure as a result.

(Testimony of Dr. Francis Chamberlain.)

usually, the patient as a rule dies of [219] heart failure.

Q. Now, Doctor, you have been in the courtroom throughout this entire trial while evidence has been given; have you not?

A. I may have missed a few minutes.

Q. That is while evidence has been given, have you missed any evidence?

A. I think the only thing I missed was the part of your talk at first.

Q. When I made my opening statement?

A. Yes, I missed that part of it.

Q. Well, that isn't evidence, Doctor, you have been here all during the taking of testimony; is that correct?

A. Yes, I believe so.

Q. And again, cautioning you not to take into any account, any opinions of any other experts, just facts, including medical facts, and assuming the testimony you have heard—pardon me, before I ask that question, Doctor, you have mentioned shock. What is the mechanism of shock; what does it do to a person with respect to the circulatory system and the blood?

A. The exact mechanism of shock isn't understood, a great deal of it is motivated through reflexes which come through nerves, but the effect on the heart, well, I should say part of the pattern in shock is that the blood pressure drops [220] strikingly due to reflex changes in the central nervous system. The blood tends to pool in reservoirs in venous reservoirs, and especially in the digestive

(Testimony of Dr. Francis Chamberlain.)

tract, so that blood, the amount of blood which is circulating in the vessels, which is actively carrying the blood, is markedly decreased. These reservoirs, especially on the return side of the trapped blood, hold it out of the circulation, so that there is in that mechanism a decreased amount of circulating blood, at the same time, with the lack of the proper amount of circulating blood and the lack of proper blood pressure, there is the lack of oxygen in the blood and the lack of oxygen in the blood makes the capillaries in the body and the tiny vessels abnormal to the point where the liquid material in the blood can ooze through the capillary walls so, as a result of all these mechanisms, the amount of blood which then is circulating in the major active circulation of the body is markedly decreased, so therefore the amount of blood which goes to the heart is decreased.

Q. Doctor, I will show you—first, I will have them marked.

The Clerk: Plaintiff's Exhibits 38 and 39.

(Documents were thereupon marked Plaintiff's Exhibits 38 and 39 for Identification.)

Q. (By Mr. Beebe): Doctor, I will show you two charts and ask you if they would be of assistance to you in describing [221] or explaining the matters you were just saying concerning shock?

A. This one is upside down.

Q. I have it upside down. You may use it in making your testimony clear.

(Testimony of Dr. Francis Chamberlain.)

A. Yes. May I demonstrate?

Q. Please indicate the exhibit number, Doctor, and please mark it, don't say "here and there," but make marks so we can identify them.

A. Yes. The chart in my left hand, which I will mark——

Q. No, it is Exhibit Number 39.

A. Number 39 represents schematically the blood in its ordinary circulation with the blue representing the veins and carrying the blood into the heart, and this little network representing the capillaries and the little venous channels where the blood goes out to the main body tissues and in this particular case, this represents the mixing of the blood in the lungs.

Q. Now, Doctor, you said "this," will you put a mark?

A. In number one we have the circulation of the lung; represented in number two we have the circulation in the major tiny capillaries throughout the body with the exception of the lungs and with the exception of the digestive tract. I should also let it be known that number two also represents that——

Q. Represents what? [222]

A. Represents the capillaries. It's what we call the greater circuit, the capillaries, with the exception of those in the lungs and with the exception of those in the digestive tracts. Number three would represent the capillaries in the digestive tract, and the red coloring represents the blood as the oxygen—deoxygenated blood where it leaves the heart and

(Testimony of Dr. Francis Chamberlain.)

goes out in the various veins, so that's a rough schematic representation of the circulation from a patient who does not have shock.

Q. And the arrows represent the direction of flow of the blood? A. Yes.

Q. We offer in evidence Exhibit Number 39 for the purpose of illustration.

Mr. Kriesien: No objection for the purpose of illustration.

The Court: It will be received for the purpose of illustration.

(Document previously marked Plaintiff's Exhibit 39 for Identification was thereupon received.)

Q. (By Mr. Beebe): Now, you are holding Exhibit Number 38 for Identification, Doctor, and will you describe that?

A. This shows the situation, a rough example of what happens to the situation in a patient who has shock, when the patient [223] has shock the various little reservoirs which are present throughout the body have stopped at the capillaries. The capillaries become markedly dilated, so that it makes reservoirs so that the blood actually stagnates out in these places instead of being continued in the regular flow of circulation, so that schematically there is a lot of blood in those little capillaries and will also ooze a lot of blood, a lot of the liquid from the blood out in the tissues.

Q. Doctor, let me interrupt you, in doing that

(Testimony of Dr. Francis Chamberlain.)

you have referred to the blue-colored veins in the chart, have you? A. Yes.

Q. As reference to where the blood stagnates?

A. Yes, and especially in the place where the blue-colored small network of veins and the vessels and where the small interlacing red network of vessels go together, then schematically, then, what happens is that the blood—some of it has been lost out in the tissues and a great deal of the other blood tends to stagnate in these vessels and so that then even under circulation, which the—where the heart may be quite normal—the heart is interfered with in its activity because it can't get a proper amount of blood with which to—I mean the proper amount of blood to carry on, to give the body its proper nutrition, and it is important in this diagram due to the fact that the great vessels that go to the heart and the great vessels that go away from the heart are shown as small [224] lines, it necessarily is the fact that the amount of blood, which is going through those vessels is decreased in amount.

Q. Thank you, Dr. Chamberlain. We offer in evidence, Plaintiff's Exhibit Number 38 for the purpose of clarifying the record and illustrating the testimony of the Doctor.

Mr. Kriesien: No objection for the purpose of illustration.

The Court: Received for that purpose.

(Document previously marked Plaintiff's Exhibit 38 for Identification was thereupon received.)

(Testimony of Dr. Francis Chamberlain.)

Q. (By Mr. Beebe): Now then, Doctor, based on the clinical record and history of Mr. Lyons; excluding the opinions of any other doctors; plus the testimony that you have heard here about his physical condition and his activities; and assuming the facts found on autopsy; do you have an opinion as to whether Mr. Lyons was suffering from aortic stenosis?

Mr. Kriesien: If the Court please, we object to the form of the hypothetical question on the ground and for the reason that it does not incorporate all the facts. We do not know and have no way of knowing the facts upon which this witness is predicating his opinion under that form of a question.

The Court: Overruled.

Q. (By Mr. Beebe): You may answer. The question is: Do you have an opinion? Now, you answer that yes or no, otherwise [225] it will be objected to as it is not responsive. Just answer yes or no.

A. Would you ask the question again? I lost the trend, please?

(Question read.)

The Witness: The answer is yes, I have an opinion.

Q. (By Mr. Beebe): What is that opinion?

A. That he did not have an aortic stenosis.

Q. Will you give the reasons for your answer?

A. The reasons are twofold. One, based on the description of the leaflets of the aortic valve and

(Testimony of Dr. Francis Chamberlain.)

the second, based on the medical records showing that no murmurs were present in the reports.

Mr. Kriesien: If the Court please, we move the witness' answer be stricken on the ground and for the reason that there is no evidence in this case that the assured did not have a heart murmur.

The Court: Motion denied.

Q. (By Mr. Beebe): Now, Doctor, assuming all of the same facts; do you have a medical opinion as to whether Mr. Lyons suffered from any aortic insufficiency? A. I do have an opinion.

Q. And what is that opinion?

A. That he did not have an aortic insufficiency.

Q. Will you give your reason? [226]

A. And my basis for that is the description of the aortic valve in the autopsy finding and the fact that certainly—at least one of the medical reports I read stated no murmurs and that the others in the course——

Q. Just a moment, Doctor, the one that you read that showed no murmurs is not in evidence, and you cannot consider it. A. All right.

Q. Now, then, may I reask the question as to whether or not, considering those reports and bearing in mind your own observation of them, and all the other testimony about Mr. Lyons' activity, your examination of him under the fishing, and all of the other evidence you have heard here concerning the life and the work he did and the clinical record, disregarding any opinions of any other medical ex-

(Testimony of Dr. Francis Chamberlain.)

perts, do you have an opinion as to whether he suffered from any aortic insufficiency?

A. I don't believe he did.

Q. Now, is it a fact or in that opinion—no—pardon me, strike that. Will you state your reasons for that conclusion in detail, Doctor, limiting it to what is in the record?

A. My belief for that is that aortic insufficiency of sufficient degree to cause a patient's death is caused by two main conditions. One, syphilitic disease of the aortic and the second, rheumatic heart disease, and the description of the autopsy report does not suggest either of those two conditions.

Mr. Mize: Your Honor, I move that the answer of the Doctor to the last two questions be stricken. I object to the questions on the ground that they are assuming facts some of which are not at issue. As a matter of fact we don't know what facts this Doctor is basing his opinion on and we have—just a minute, Mr. Beebe—and secondly incorporated into the question propounded by Mr. Beebe and the Doctor's own response, his opinion was based among other things on the findings of others and I think that it is not a proper hypothetical question, either one of the last two questions, and I believe that they are improperly stated and contain facts which are assumed by the Doctor and which are not in evidence and move that the answers be stricken.

The Court: The objection is overruled and the motion denied.

Q. (By Mr. Beebe): Have you finished your

(Testimony of Dr. Francis Chamberlain.)

answer, Doctor?

A. I think so.

Q. Now, I want to return to the question of shock. Now, in the state of shock, if the amount of blood which comes back to the heart is reduced, would that cause an undernourishment of the heart muscle?

A. Yes, sir.

Q. In your opinion?

A. Yes, sir. If it's reduced in considerable degree?

Q. Yes. [228]

A. Yes, sir.

Q. And the degree of undernourishment of the heart would depend upon the degree of shock and the degree the flow of blood was reduced; is that correct?

A. Yes.

Q. Now, Doctor, in your opinion, if Mr. Lyons had died from a sudden or acute aortic insufficiency, would it have been evidenced on autopsy by a dilation of the aortic ring?

A. It would have, if the etiology had been syphilis. By the aortic ring, I assume you mean to be the base of the aortic valve on which the valve itself is seated?

Q. Yes, I mean that, or I mean would they have found dilation of the aortic valves themselves?

A. If he had died from—if the aortic insufficiency had been due to rheumatic heart disease, the aortic valve, not the base but the aortic valve itself, would have been seen to be dilated or what actually—I should say that the leaflets are fused and sealed together so that it can't close. That is obvious to the pathologist when he examines the heart valve.

(Testimony of Dr. Francis Chamberlain.)

Either of those two—either the plastered valve leaflets you might say, or the rheumatic heart disease cause dilation of the aortic, of holding the edges of its leaflets, of the aortic, apart—either of those two conditions would be seen in an autopsy of a person who died from aortic insufficiency. [229]

Q. Well, were the leaflets that you have described the same as leaflets that has some atheromatic deposits on it? A. No, sir.

Q. How did it differ?

A. There is an extensive degree of scarring which doesn't appear to be the atheromatous plaques. They open and then this atheromatous plating like material—these are scars and distortions—I should say scarring, twisting, distortion of the valve proper and especially the edges of the valve.

Q. Now, Doctor, considering all the testimony concerning Mr. Lyons, and again excluding all the opinions of others and limiting it to the facts in the medical record and the testimony you have heard, and what you have observed; the factual testimony you have given yourself; do you have an opinion as to the condition of Mr. Lyons' heart prior to the fatal occurrence on February 10, 1953?

Mr. Kriesien: If the Court please, I object to the form of the hypothetical question again on the ground that counsel does not know what facts are being incorporated in the hypothetical question and upon which the doctor is predicating his opinion.

The Court: Overruled.

(Testimony of Dr. Francis Chamberlain.)

wonder if—you have answered the question already that I just asked—I wonder if you would explain it to the Court, the mechanism or physiology by which you—it is by which you believe the gunshot wound was the cause of Mr. Lyons' death.

The Court: He has already done that.

Mr. Beebe: Has he?

The Court: Yes.

Mr. Beebe: Except, your Honor, that the witness suggested that—did you get to finish your explanation of the mechanism or physiology of that, Dr. Chamberlain?

The Witness: I think there was one point that I didn't explain before the recess, and that was that this was the role of the shock in the production of the whole thing, that the shock resulted in the heart getting too little blood supply, less blood than usual, at the same time the situation which would prevail at the time a gun exploded, caused the heart's unusual demands. In other words, the heart suddenly speeded up, abruptly the blood pressure suddenly rises, the adrenalin poured out of the adrenal glands which causes an excess, a wasting actually of the oxygen which is already in the heart, so at the same time the shock, the associated shock and the associated emotional upset, there is a greater stimulation of the autonomic or automatic nerve system, so that the findings [233] or sum total of all of these things in addition mean that some nerve capable of starting the reflex nerve which goes from various parts of the body to the heart controlling its mechanism, in addition to the setting that off, a situation existed

(Testimony of Dr. Francis Chamberlain.)

wherein the heart gets less blood supply than usual and at the same time needs more.

Mr. Mize: Are you through, Doctor?

The Witness: Yes.

Mr. Mize: Your Honor, I move at this time for an objection to the last question and move that the answer be stricken on the ground heretofore stated by myself in connection with all of the questions propounded to this doctor and his answers in connection with his opinion as to the cause of this man's death.

The Court: Objection overruled. Motion to strike denied.

Q. (By Mr. Beebe): Now, Doctor, with the same assumption and with particular reference to the facts as shown by the autopsy, that Mr. Lyons had some atheromatic deposits—plaques in the coronary arteries and that the coronary arteries were diminished in caliber to some extent, because of that, under those circumstances how would the shock itself affect his heart functioning?

Mr. Kriesien: If the Court please, we object on the same grounds there is no evidence in this case that the shotgun preceded the heart attack. [234]

The Court: Overruled.

The Witness: Am I asked then to answer that question, the objection was overruled, Judge?

The Court: Yes, I overruled the objection to the answer and to the question.

Q. (By Mr. Beebe): In other words, what I am driving at is what part, if any, did the atheromatic

(Testimony of Dr. Francis Chamberlain.)

deposits in the coronary arteries play in bringing about the death, if any?

A. I don't feel that it necessarily plays any part. I think—I feel that these things could happen with or without atheromatous plaques.

Q. Now, Dr. Chamberlain, are there medical records or are there facts in the record which—from a medical standpoint, make it necessary that the shot-gun exploded prior to the onset of the fatal heart attack?

Mr. Kriesien: If the Court please, I object on the grounds and for the reason that that is not within the realm of opinion testimony that this witness is qualified for and fails to incorporate the facts upon which it attempts to predicate the opinion.

The Court: You are getting into the realm of conjecture with that question, and I am going to sustain the objection.

Mr. Beebe: I think, your Honor, at a convenient time we would like to make an offer of proof.

The Court: I don't want to hear any offer of proof. The [235] Court has ruled.

Mr. Beebe: Thank you.

Q. Doctor, with respect to the testimony that Mr. Lyons was pulseless when Dr. Rush got to him, did that have any significance in connection with the pulselessness, but with still some heart activity, does that have some significance in connection with that autopsy finding of—no, correction—for the autopsy finding, does that have any significance in connection with passive congestion and pulmonary edema?

(Testimony of Dr. Francis Chamberlain.)

Mr. Kriesien: If the Court please, I will object to that question, as the question is confusing, and move that it be stricken.

The Court: There was some testimony that there was a murmuring; if that may be deemed as activity I will allow the question.

The Witness: I am sorry again, sir, would you repeat the question?

(Question read.)

Mr. Beebe: Let me amend that.

The Court: I don't think you had better amend it, I think you had better start all over.

Q. (By Mr. Beebe): Thank you, your Honor, I am sorry.

Now, Doctor, would the fact that a man was pulseless and yet had some heart action have any significance in bringing about pulmonary edema or an enlarged liver as was found [236] in this case?

Mr. Kriesien: Same objection.

The Court: Overruled.

The Witness: Yes, I think it's quite important.

Q. (By Mr. Beebe): And what is the importance of it, what is the significance?

A. The answer is that I believe as I stated before that sudden death, that sudden standstill of a heart, for example, doesn't result in evidence of congestion in the liver. Sudden standstill does not result in evidence of congestion of the liver or evidence of congestion in the lungs such as was described here. That

(Testimony of Dr. Francis Chamberlain.)

sort of thing takes minutes of life and blood flow for a period of at least a few minutes.

Q. Now then, Doctor, was the existence of pulmonary edema and enlargement of the liver significant in this case?

A. Those are the evidences which were described by the autopsy and the other evidences for pulmonary edema were described by Dr. Rush, with foam which was first frothy and then pink frothy, and after two or three minutes after the stertorous breathing was observed.

Q. Well, was that fact of significance in this case in connection with your opinion?

A. Yes, I think so. I think that is one of the bits of evidence to suggest, that also tended to support the concept of this man's heart continuing to beat, not effectively enough [237] to produce a pulse, but there was some continued heart action for some time following death.

Q. And, Doctor, would the autopsy report—it shows the presence of two bile stones, one, one centimeter in diameter and the other, three millimeters in diameter. The large stone being at the union of the cystic duct and the common duct. Does that finding on autopsy have any significance in this case with respect to the cause of death?

A. I don't believe so.

Q. Now, Doctor, would you give the reason for that, please?

A. Yes. There is some animal work primarily

(Testimony of Dr. Francis Chamberlain.)

showing that there were some reflex pathways between the gallbladder and that part of the digestive tract, and it stops circulation, so that it has been shown, for example, that in dogs that have coronary disease, not normal dogs, but dogs which have been made to have coronary disease artificially, that if the gallbladder is dilated, is blown up with a balloon, for example, the electrocardiogram will look worn and scored. And there are occasional reports in humans who, in the presence of coronary disease, and with occasional cases the heart pain may get better, if the gallstones are removed. On the other hand, I know of no place in the literature and certainly none from my own experience where I felt that a gallbladder attack would result in the death.

Q. When you were with Mr. Lyons, did you observe any symptoms of [238] gall bladder sickness or gall bladder attack? A. No, sir.

Q. Now, Doctor, in the autopsy report there was some evidence, you probably recall it better than I do, about adhesions to the diaphragm and some attachment of the pericardium to the chest wall; some fusion of the lungs with adhesions. Were those of significance in the cause of Mr. Lyons' death in any way? A. I don't believe they were.

Q. Assume that this man had a severe chest injury with a pneumo-hemothorax, and what would your opinion be with respect to the cause of these adhesions from some crushed ribs?

A. The most likely thing would most certainly

(Testimony of Dr. Francis Chamberlain.)

be the adhesion of the pericardium due to trauma at the time of the injury.

Q. You may cross-examine, Mr. Kriesien.

Cross-Examination

By Mr. Kriesien:

Q. Dr. Chamberlain, your own personal observation of Mr. Lyons was during the few days that you were together prior to his death; is that right?

A. Yes, sir.

Q. And were you observing him from a standpoint of a doctor or were you just around about as friends?

A. Certainly as friends rather than as a doctor.

Q. I mean, you were not paying too much attention to his [239] physical condition; were you, Doctor?

A. We were—it's unusual to have four men—five men closely associated for a period of several days, so I was unusually close, I was in close contact with him certainly, I should say more so than just as a casual one.

Q. Doctor, in your opinion in testifying about the aortic insufficiency, you continually referred to the fact that no heart murmur was detected and there was evidence to that effect in the medical case history files, can you tell me where it is revealed in the files?

A. I went through the affair, and I thought that I saw some letter, I thought that I had where it was

(Testimony of Dr. Francis Chamberlain.)

stated that there were no murmurs. I think that there was some evidence that I heard today about no murmurs and that was Dr. McKeown was the family doctor who had examined Mr. Lyons for a big insurance policy and subsequently at various intervals stated in this room this morning that there were no murmurs.

Q. I believe that was back in 1950, Doctor, about the last time, and you were asked not to predicate your opinion on the opinions of others. You were putting the basis of your entire opinion upon clinical findings that the man did not have a heart murmur.

A. May—I don't believe Dr. McKeown stated that he looked for heart murmurs in 1950, that he continued examining the man for five years, and if you say the opinion that you asked [240] for—well, it is not my province to argue, I am sorry.

Q. All right. Well then, that would be his opinion whether there was a heart murmur or whether or not there was not; is not that correct, Doctor?

A. Dr. McKeown's?

Q. And that, Doctor, would be nobody else's, that would be his opinion? A. Yes, it would.

Q. Can you point out where in the record there is any clinical record that Mr. Lyons did or did not have a heart murmur? Not the opinion of the party?

A. You mean in the written record?

Q. That is correct, the record that is in the exhibits in this case.

A. Well, I am not sure that there is some specific

(Testimony of Dr. Francis Chamberlain.)

reference to no murmurs other than in that one single letter or whatever it was that I saw, but I don't remember the exact wording, but I think that the physical examination was negative or something of that sort, as I recall the man was examined because of chest pain, which might—I mean with the thought that this might come from his heart by two examiners and in their notes it would be the custom, certainly, if you found a hell-roaring murmur such as you would expect with aortic insufficiency, to mention it.

Q. But then again, that is a matter of opinion of the doctors? [241]

A. It's customary for all doctors to write down major physical findings on physical examination, and a murmur is a very important finding.

Q. Is any such a finding written in any of the record here? A. That there was a murmur?

Q. Or, that there was not a murmur?

A. Well, I—apparently not.

Q. All right. Now, let's remove from your opinion the item of any evidence, either that there was or there was not a heart murmur, then, basing your opinion upon the data, information contained in the autopsy report, can you say that the man did not suffer from an aortic insufficiency?

A. I would.

Mr. Maguire: I suggest, your Honor, counsel has either misconceived or has not indicated it right, a man has a heart murmur, it's not a question of a physical finding, it is a question of hearing. You can

(Testimony of Dr. Francis Chamberlain.)

say I look at this wall, your Honor, is back of the bench—that I see you there and I hear you speak, and that is my—and not my opinion, it is a sound that I hear. I think it is not quite fair to the witness.

The Court: Is the matter of existence or non-existence of a heart murmur, is that a matter of opinion, it is a matter of objective physical finding. Well, you pursue that line of examination. [242]

The Witness: I'd say in answer to your question, on the basis of the autopsy material alone, I do not believe this man had aortic insufficiency.

Q. (By Mr. Kriesien): All right. Now what did the autopsy report say, Dr. Chamberlain?

A. Or, may I say, because without high blood pressure—your information whether he had high blood pressure or not, I mentioned that several per cent or so of the patients who have hypertensiveness, have slight, relatively unimportant degrees. To be fair, I can't rule that out. But I can say on the basis of the autopsy findings alone, I can feel certain that there was no physiologically important degree of aortic insufficiency, yes.

Q. Now, the wording of the autopsy report is, I am reading from your exhibit, "A thickening and stiffening of the aortical sigmoid aortic semilunar valves. With atheromatic deposits." Now, this report does not indicate the degree to which the valve was thickened or stiffened? A. That's right.

Q. All right. Now, if it was thickened considerably and stiffened considerably, then would it be a cause of aortic insufficiency?

(Testimony of Dr. Francis Chamberlain.)

A. No, because the deformity of this valve which would have to cause this patient to have aortic insufficiency would be stiffening plus it would be narrowing, scarring, distortions [243] characteristic of rheumatic heart disease. There is more rheumatic heart disease in Mexico City, certainly, than we have in our country, so that the Mexicans have an unusual experience with rheumatic heart disease, and I would like to say that I have looked at some hearts in which the valve is scarred from rheumatic heart disease.

Q. All right, Doctor. Now, you say they have had considerable experience with rheumatic heart disease. And it has been determined previously, and they give as a first cause of death, aortic insufficiency—the direct cause of death. Now, Doctor, from their experience with that disease, would they not be in a better position than you, from the meager findings of this autopsy report, to arrive at a conclusion as to the direct cause of death?

A. I am not sure, because I think this certainly, that these were two country doctors. Two young country doctors. Dr. Serrano who told me they didn't do many autopsies. Theirs were supervised experiences in the field. I wouldn't expect to see the garden variety of findings, but to look at an autopsy and have a lot of physiological concepts on which to base a valid—or to have an opinion such as a pathologist, such as Dr. Lehman, it is an altogether different situation.

Q. Dr. Chamberlain, that was not an answer to

(Testimony of Dr. Francis Chamberlain.)

my question. My question was: Was this experience that you have talked about with the Mexicans, and having observed the conditions of the aortic valve, would they be in a better position to [244] arrive at a conclusion that the man's direct cause of death was an aortic insufficiency, rather than yourself, who have examined this autopsy report?

A. I don't think they necessarily would, because I consider myself an expert in the cardiology field and I think I know a good deal more about this than they do. Probably about—I would doubt for instance if you went to the average student, perhaps, and asked him about the causes of aortic insufficiency, how many of them could give you as correct an answer as I think I can, because I am teaching that sort of thing constantly. I am not sure they could see more in that autopsy and make an opinion on a technical point like that, than I am able to.

Q. All right. Let's talk about the coronary arteries. You state that you feel that they didn't necessarily play any part in the death of Mr. Lyons; is that correct? A. Yes.

Q. Now, upon what do you base that opinion, and I mean clinical findings, Doctor?

A. Clinical findings?

Q. Yes, as contained in the Mexican autopsy report.

Mr. Maguire: If your Honor please, I think that there is improper cross-examination in that the doctor's opinion was based upon the history of Mr. Lyons and upon a great many other things in addi-

(Testimony of Dr. Francis Chamberlain.)

tion to the autopsy report. I think [245] the question is unfair.

The Court: Overruled.

The Witness: Now, you say the clinical findings on the basis of an autopsy report, you don't call an autopsy clinical findings, you mean based on the autopsy findings?

Q. (By Mr. Kriesien): I will read it to you.

A. Yes.

Q. The autopsy findings were, the coronary arteries were dissected and were found to be reduced in caliber from atheromatic deposits. Now, you state that you don't feel that the condition of the coronary arteries necessarily played any part in this occurrence? A. That's right.

Q. Now, do you know to what extent the coronaries were diminished? A. No, sir.

Q. In caliber?

A. No, and that's why I said I don't think that it necessarily played any part. I think you can say this, from the autopsy report, this, they were not completely plugged, that they were reduced in caliber, which gives you a tremendous leeway, doesn't it? That would be anything from a very infinitesimal amount in the reduction in caliber to a very severe amount, but there is nothing there to state that there is a severe degree. There is nothing there to state that there is any [246] arteriosclerosis that a man 49 years of age could have.

Q. It doesn't say there wasn't a great deal more?

A. It doesn't say there wasn't.

(Testimony of Dr. Francis Chamberlain.)

Q. Now, as I understand, a complete blockage of the coronary arteries is an occlusion?

A. What is that, sir?

Q. Complete blockage is an occlusion?

A. Yes.

Q. Rather than a coronary insufficiency?

A. Now, I don't follow your latter part of that question, but a coronary insufficiency—should I rave on?

Q. Go ahead.

A. By coronary insufficiency, we mean impairment of the blood supply to the coronary to the point where the blood flow is insufficient to carry on the proper working of the heart.

Now, that may be a narrowing, as I pointed out in my other testimony, is where the coronaries are so impaired by the atheromatous deposits so as to produce important coronary pain, or as to produce a cardiac infarct, that there were at least two major branches which are completely occluded and often three, and sometimes more, and that is the fact which has revised some of the older thinking by—and I think you will find all pathologists now agree with, that was the sort of thing that was described.

Q. It is not described in the autopsy? [247]

A. In the autopsy.

Q. All right. But now, the doctor concluded that the secondary cause of death was coronary atheromatic deposits, coronary insufficiency, then to congestion of the lungs and the liver. Now, I will ask you again whether your not having observed the

(Testimony of Dr. Francis Chamberlain.)

coronary arteries of Mr. Lyons, whether the Mexican doctor was in a better position to render an opinion as to whether the man died of a coronary insufficiency as a result of the diminished caliber of the arteries?

A. No; I don't think the pathologist is. One can have considerable degrees of normal closing of the coronary vessels, some of them even close in some individuals who lead very long lives and carry on strenuous exercise, and have no symptoms or signs of coronary disease whatsoever, so that the physiological concept of what man can do and the analysis of the steps that brought about his death, I think—and watching him exercise, and all of these other things, I think gives the person a better idea of what the coronary vessels do than some amateur pathologist who is looking for foul play, and conducts an autopsy. He is looking at it from a different standpoint, and he doesn't have these facts.

Q. Dr. Rush had the same background; did he not? A. Yes, sir.

Q. I believe Dr. Rush, in the affidavit he submitted in support of the plaintiff's proof of death of James A. Lyons— [248] have you ever seen that affidavit? A. I don't think so.

Q. All right. I will ask you this question. From the findings contained in the Mexican autopsy report, would you say that Mr. Lyons had a disease of coronary arteries?

A. This depends on what one's concept of disease

(Testimony of Dr. Francis Chamberlain.)

is. You say that a person who has gray hair is diseased, whether you will say it is the usual evidence of aging, the average evidence of aging for a man of a given age group, if you want to call that as disease or not, I am not sure. I'd say certainly, he had—he didn't have the coronary vessels that he had when he was born, but from the evidence presented, I don't think it—there is any evidence presented that his coronary vessels were bad any more than a man of 49, because apparently all men of 49 have atheromatous deposits.

Q. But the evidence on that is negative, because the autopsy report doesn't state how much there was of the artery diminished; is that correct?

A. That's true. The autopsy doesn't show that. That is, I'd say negative, I'd say it is nebulous.

Q. All right. You, as a doctor, speaking medically, if the condition of the coronary arteries was the same as that that would be found in a man in the age category of Mr. Lyons, if you were diagnosing that condition, would you call it disease or would you say that the man has a usual amount of coronary [249] deposits for a man of his age category?

A. Well, I am not sure, that is, I think you could refer to it either as a disease or you could refer to it as the usual amount of aging process. I think again, that a lot of this diminishment, even down to where there is any derangement, any departure from norm particularly you could call a disease, I don't think it is proper to make a person determine

(Testimony of Dr. Francis Chamberlain.)

it as a disease or not disease. Sure, he had some evidence of aging, and I don't think it makes much difference whether you want to call it disease, some might, or evidence of normal aging.

Q. Well, would you call it disease?

A. Not necessarily. I think—well, I think it's a debatable point. I think you could call it either a disease or you could call it the normal aging. I think it's—it depends on one's philosophy of it. I'd say it's not a departure from the norm, and some would call a disease a departure from the norm. And if one uses that concept, which my understanding of—well, I will not embark on that.

The Court: How long are you going to be, counsel?

Mr. Kriesien: Quite a while, your Honor.

The Court: We will have to adjourn then until Monday.

The Court will stand adjourned until Monday morning at 9:30.

(Whereupon, an adjournment was [250] taken.)

(Pursuant to adjournment on November 23, 1955, proceedings were resumed at 9:30 o'clock a.m. Monday, November 28, 1955.)

The Court: Are you ready to proceed?

Mr. Kriesien: Ready to proceed, your Honor. I believe Dr. Chamberlain was on the stand.

The Court: Doctor, will you take the stand, please?

DR. FRANCIS CHAMBERLAIN

resumed the stand as a witness on behalf of the plaintiff, and having been previously duly sworn, testified further as follows:

Cross-Examination

(Continued)

By Mr. Kriesien:

Q. Doctor, prior to our adjournment for Thanksgiving holiday, I do not know whether I asked you this question. If I am repeating myself, I am sure the Court will overlook it, but I believe it was your testimony that Mr. Lyons' diminishment of the caliber of the coronary arteries was no different than that of a man in the same age range; is that correct?

A. I believe I said, not necessarily different.

Q. I see, but you remember testifying that his coronary arteries were or were not in the same condition as a man in the same age range?

A. We can't be entirely sure by the autopsy statement just [251] how much narrowing of the caliber of the coronary was. He said that the caliber was diminished, and generally, when—you people, I know went down and talked to the doctor again a few months later, and he was asked the same question and he said it was impossible to state, and it's my feeling that if there is a sufficient degree of coronary artery narrowing to be important enough to produce sudden death or to produce clinical manifestations such as true coronary pain, that there are some coronaries, very many, some major coronary

(Testimony of Dr. Francis Chamberlain.)

branches which are completely closed, and that also was not described.

Q. Do I understand, Doctor, that you must have a complete closure of the coronary arteries or one of them to have a coronary insufficiency?

A. One of the major branches. It's been shown by Slessenger and Bloomgard, and revolutionized our thinking some 10 or 20 years ago, as has been shown in the major textbooks, that before a patient gets clinical evidence of coronary disease—in other words, where he gets heart pain during—major true heart pain during, not two hours later, but during the peak of strenuous physical exercise, that he has at least two and often three major branches of the coronary circuit completely blocked, and when he gets sufficient narrowing of the coronary arteries to get myocardial infarction, where some of the heart muscle is suddenly completely deprived of its circulation, that there are two or three and often four major branches [252] of the coronary vessels that are completely plugged.

Q. The autopsy report does not show one iota in that respect; does it?

A. Well, the autopsy mentioned that the caliber was narrowed, but it didn't say that there was closure.

Q. Now, is coronary insufficiency an accepted cause, medically, of a hypertrophy of the left ventricle? A. No.

Q. It's not. And what about an aortic insuffi-

(Testimony of Dr. Francis Chamberlain.)

ciency; is that an accepted cause, medically, of a slight hypertrophy of the left ventricle?

A. Yes; it is.

Q. Can an aortic insufficiency be diagnosed in a person by merely being with them, seeing them exercise and sitting across the table from them?

A. Well, it usually can; yes. These things, of course, are a matter of degree, but usually the coronaries, coronary insufficiency, I should say, is apt to come out if one produces it artificially, it is apt to come out under circumstances of maximum heart load, peak heart load. In other words, it doesn't come when a person is sitting, or on the other hand, a heart that is physically tired or initially tired, it comes when he is carrying on the peak of physical exertion, and the way we usually demonstrate it, the way we bring it out, is by having a patient deliberately exercise, and sometimes we [235] go out and you can walk up and down the stairs with him a bit to see if he develops a pleural pain.

Q. Well, Doctor, aren't there any other precipitating forms of a coronary insufficiency, other than exertion?

A. Yes; I think anything that could bring out a peak heart load could produce.

Q. Could emotional factors precipitate coronary insufficiency?

A. Usually an emotional factor will not precipitate it nearly as readily as physical exertion will. As a matter of fact, at the university we used a cap pistol in the course of our taking an electrocardio-

(Testimony of Dr. Francis Chamberlain.)

gram, at the University of California electrocardiology department when I was there, and in the course of taking the examination we shot a cap pistol off and said, "Oh, my," as though the machine had broken, to see if we could produce electrocardiographic changes, and the chance of producing the changes like that, from some sort of a fright, was very exceptional that we could; however, whereas in a patient who had a sufficient narrowing of the coronary arteries demonstrable clinically, we could produce electrocardiographic abnormalities in the course of the strenuous exercise in about half of the patients that we thought truly had the coronary disease of this particular group. This particular group I might say were one—where one has to use the exercise tests, in other words to produce electrocardiographic abnormalities represent usually an unintelligent group of patients who were represented especially [254] by some of our clinic patients with a lack of education, and so on, who haven't registered the fact that when we do something physically strenuous, that the pain comes on while they're climbing the mountain. during intercourse, and so on.

Q. But it is medically possible for an emotional factor such as this to precipitate a cause of acute coronary insufficiency?

A. It's possible, but I don't recall an instance offhand of any patient who had his coronary pain during the course of excitement, rather than exercise, unless there is something else physically which intervenes, such as hardening of the arteries or an

(Testimony of Dr. Francis Chamberlain.)

arthritic infirmity, or something of the sort. The first thing that happens the patient will tell you is pain that comes on on the peak of physical exertion.

Q. I will ask you whether or not a disturbance of rhythm of various parts or mechanisms of the heart can result in acute coronary insufficiency?

A. Yes, it can; and it can in even a younger perfectly normal individual.

Q. As a matter of fact, Doctor, anyone can, of a dynamic driving type can die of a heart attack; isn't that correct?

A. Well, a person—I think that—that's—that question is sort of how high is up. Anybody of any type can die of a heart attack.

Q. That is correct.

A. If you are referring to the predisposition of energetic or dynamic personality can have a coronary—is that what [255] you are after?

Q. Yes.

A. That there is a good deal of dispute in literature which comes up constantly as to whether the extra energy that a businessman shows with the driving type of executive, whether that is a predisposing factor of the development of coronary disease, and there are a great many conflicting bits of evidence in the literature, so we aren't certain about that. Statistically, the life insurance figures have shown that a bartender and a barber are more prone to develop coronary disease than the businessman, than the high-pressure executive, and it also, I think, is important to know that the high-tension

(Testimony of Dr. Francis Chamberlain.)

business executive, although he falls into a group where he is more apt to get coronary disease, than the laborer, for example, who works constantly with his muscles, and not with his brain for a living, although the executive has a little greater predisposition so that the life insurance companies who are gambling on whether a man will live, will rate him up high, for instance, more than it rates up the bartender and the barber, and for other certain groups and why, the medical profession doesn't understand. And one factor, and probably the most important factor is that high blood pressure is known to be predisposed to, in part, by high-tension work, and of these individuals, certainly a good many of these individuals have high blood pressure. Of the cardiac deaths [256] that we see of the 52 per cent of all the population, now, who are dying, who die of heart disease well over 50 per cent of those who die of heart disease are known to have high blood pressure, at least as part of the mechanism of the destruction of their heart, so that blood pressure is very important.

Q. It is a fact, medically, is it not, Doctor, that many times individuals suffer a heart attack when there is no clinical findings of any condition of the heart?

A. It depends again on what you call a heart attack. Now, if you call an abnormal rhythm of the heart a heart attack, the answer is yes. The answer is that a great many individuals—I myself have had

(Testimony of Dr. Francis Chamberlain.)

a rapid abnormal rhythm of the heart, and I don't know—in the general run of the population—but I would guess—about, I would guess about at least a quarter or probably more of all individuals have these episodes of sudden onset of a rapid abnormal heart rhythm at some time in the course of their lives.

Q. What is that tied in with, heart beat, Doctor?

A. Yes; it means that the heart rhythm becomes abnormal to the point where it beats anywhere between 50 and 100 which we consider as normal range for the heart, very suddenly will begin to develop this abnormal rhythm where it may beat anywhere from 130 up to 300, that is the ventricle, that beats 130 up to 300 and, of course, the milder degrees for [257] instance if a person gets a beat of 130 to 150, many of them don't even notice it, but if the rate happens to be unusually rapid, such as around 240 or 250, most individuals even though they have perfectly normal hearts, develop the pain symptoms under those circumstances of coronary insufficiency, and if it gets, if the ventricles get to the rate of about 230, the heart has so little time to fill between beats that there isn't sufficient blood to supply it, and so the patient has unconsciousness and he also is pulseless because there isn't sufficient output of the heart to make the heart-beat pulse felt at the wrist or capable of nourishing the brain, giving the brain tissues sufficient oxygenated blood to maintain consciousness.

(Testimony of Dr. Francis Chamberlain.)

Q. What about the pulse range of a hundred to 130; is that abnormal?

A. There are some individuals who have a heart rate from 100 to 130 without any disease whatsoever, and who have it as a result of nervousness alone. There are, we see some whose heart rate is also above 130, some patients who develop—I should say the commonest cause of a heart rate above a hundred has some factor outside the heart, overactive thyroid or some disease somewhere that the body or even a traumatic condition anywhere in the body under circumstances especially associated with fever, the average patient who has fever has a fast heart rate, and of course those patients with fever, [258] the fever doesn't have anything to do with their heart.

Q. Well, is it of any medical significance to you, Doctor, the fact that Mr. Lyons had a heart beat of say in excess of 110 over some continued period of time?

A. As I understand from my summary of the medical record, that occurred during the time when he had this trauma, when his lungs were filled—I mean the lungs adjacent to the hemothorax from having fractured ribs as I understand, those were the circumstances surrounding the period of time when he had the rapid rate. I should say that the two electrocardiographs which were just as good as my being able to take, the heart, in the one in 1950, and the one taken in the week or so before his death showed a normal heart rate.

Q. Now, Doctor, you gave as your opinion, I be-

(Testimony of Dr. Francis Chamberlain.)

lieve, to the effect that this nitroglycerin that was prescribed for Mr. Lyons on February 4, 1953, was not for a cardiac condition, angina pectoris or anything of that nature; is that correct?

A. I believe that it was—I believe that it was given as a diagnostic aid, since there might have been some uncertainty on the part of the doctor as to whether some of this pain represented coronary disease or whether the pain could have been the result of some digestive upset, such as gallstone or spasm of the lower end of the stomach, or the lower end of the esophagus, both of which occurs frequently in the course of fatigue, and my reason for that, I believe in some [259] of my testimony from last Wednesday, I said a little bit about that, you asked me about whether the record showed that there was any murmur or not, the testimony with which I had reference to was not admitted as evidence here, but I was a little bit confused, but I have since looked up the testimony and the things referred to——

Q. Just a moment, whose testimony have you looked up?

A. Dr. McBride's deposition, describing his examination of Mr. Lyons a week or so prior to his death. I refreshed myself about it over the week end and found that Dr. McBride, who specializes in internal medicine went through it, described it in a two- or three-page dissertation his examination of Mr. Lyons at that time, and the symptoms and what they meant to him. the physical findings and he—

(Testimony of Dr. Francis Chamberlain.)

although he didn't say specifically there were no murmurs he said there was no objective evidence of disease, and certainly a murmur is one of the very major—a murmur is the most—probably the most important objective evidence of disease that a doctor would look for in a heart study. That is the thing we look for in physical examinations, and physical examinations give us 35 per cent of the important tools with which we make a diagnosis, and he stated that there was no objective evidence, and he stated also that on a basis of his study which he described, and where the description sounds as though he had been thorough and had made exercise tolerance tests and so on, [260] that he felt that there was no disease. That Mr. Lyons was worn out, and that he needed this vacation. There was one other thing, I might mention about the nitroglycerin—or may I?

Q. Definitely. My question was about the nitroglycerin, Doctor.

A. Was that it seemed to me that Mr. Lyons was not convinced about the significance, about the importance of the nitroglycerin because of the fact, the whole one part of our whole trip where he had an opportunity to exercise, where we were going shooting, namely the only time we left the ship, I think that was the only time in the whole—from the time we boarded the ship, the first time we left it was when we went on this hunting trip, I myself was there when his body and his pockets and so on were completely searched. He did not take the nitroglycerin with him on this hunting trip.

(Testimony of Dr. Francis Chamberlain.)

Q. Now, Doctor, did you locate the nitroglycerin tablets? A. No; I didn't.

Q. Did you make a search for them?

A. No; but I know where they were. As a matter of fact the nitroglycerin, I heard——

Q. Not about what you heard, I am asking you what you know.

A. Well, this—Mrs. Lyons had sent his wallet, and the nitroglycerin tablets were in his wallet.

Q. He did not have his wallet with him? [261]

A. He went off—he didn't have his wallet with him when we went hunting.

Q. Now, on the nitroglycerin, you said in your opinion it was used for a diagnostic aid?

A. I didn't say it was, I said it is frequently used, and that it's my impression after, especially after seeing Dr. McBride's record of what he thought, that it was used as a diagnostic aid. It was either used as a diagnostic aid—I think I mentioned that one can never completely rule out the possibility of coronary disease, that he probably used it under those circumstances. The other thing about that, one of the things we do for a patient is not necessarily diagnosis, but it is given for a patient for relief, and if he gets relief from indigestion by using it, well what is the harm, let him use it for that. We are unwise not to use them like that.

Q. Doctor, I believe the medical case history file of Dr. McBride reveals that on February 3, 1953, the man had constricting chest pains with arm radiation. On February 4th, he had constricting chest pains

(Testimony of Dr. Francis Chamberlain.)

with arm radiation and that nitroglycerin was prescribed, and that on February 5, 1953, the pain had some diminished or improved. Would that be of any significance to you after the nitroglycerin had been prescribed?

A. No; I don't think so, because if the nitroglycerin helps [262] coronary pain, it helps the type of coronary pain usually that comes on during strenuous effort, and it helps immediately. That's hence the diagnostic, see, it helps it immediately so that within a minute or so the pain is completely gone. It doesn't prevent the next pain that should come along under some further strenuous physical exercise. It gives systematic help and shortens the attack, but it comes back later, and has none—I'd say no, the patient that is intelligent, and is having frequent attacks of coronary, will come back and say that medicine is wonderful, I took it and the pain disappeared just like that.

Q. Yes, Doctor; but we have here a man who came back on February 5th, and he says the pain is some improved.

A. He doesn't say the pain disappeared or was shortened. If a person gets a heart attack the individual attack is very short, but he just has it a short time.

Q. Well, aren't we playing on words that were used by Dr. Wilson in describing the effect of the nitroglycerin—Dr. McBride, rather, pardon me?

A. I don't think so.

Mr. Beebe: If the Court please, that is a foolish question and is not proving the medical opinion as

(Testimony of Dr. Francis Chamberlain.)

to whether or not the patient having nitroglycerin had anything to do with it, it is simply the statement that the patient said that the pain had improved some. [263]

The Witness: I think this isn't—wasn't a heart pain at all, and that life is beautiful since you gave me that medicine. If nitroglycerin helps the coronary pain, the patient says I still get the pains but when I take the nitroglycerin, it disappears in one minute instead of five minutes. That's the difference that nitroglycerin makes in coronary attacks.

Q. (By Mr. Kriesien): Now, Doctor, I believe you also stated that this remark about Thaverine, that was some type of pill, I forgot what you described it as——

A. I thought it was some kind of a vitamin, I am not sure. It's not known to me.

Q. If it is established that that is a pill for a heart condition, would that alter your opinion as to what the nature of the attack was in February of 1953? A. No; I don't think so.

The Court: What was that word you used?

Mr. Kriesien: Thaverine.

The Court: I have never heard of it.

The Witness: I think that a great many physicians have a tendency when a patient comes in, to give him something, and I think that if this were a major form of treatment known to help heart disease, that I would probably have heard of it, because I pride myself on keeping pretty well up to date on these things.

(Testimony of Dr. Francis Chamberlain.)

Q. (By Mr. Kriesien): Now, Doctor, isn't it medically [264] accepted that when an individual has constricting chest pain and radiation down the arms that such an individual is to be considered as having angina pectoris, unless it is proven otherwise?

A. Yes, sir; I think one could say that with some qualification, I could say not, because it is the commonest type, the commonest cause of constricting pain in the chest, but because coronary disease is a very important disease it is like saying look at all the snakes, it looks like one of them may be a rattler, but few of them are.

Q. Well, now, with fatigue pain from emotional overwork or from exercises; is that as you have described in the chest region, is that of a constricting nature?

A. It may be. It's a varied type. Sometimes it is an ache and sometimes it is a burning and sometimes it is constricting. It varies a great deal.

Q. And which is the most probable?

A. I think the commonest single pattern is an aching type of pain.

Q. Now, can a man who has a condition of angina pectoris do exercise without showing any loss of breath?

A. Again, it's a matter of degree. The usual symptom associated with coronary heart disease is not breathlessness, but most commonly pain comes before breathlessness occurs.

Q. I see. Doctor, isn't it medically accepted that

(Testimony of Dr. Francis Chamberlain.)

death [265] may occur from ventricular fibrillation where a patient merely has mild symptoms of angina pectoris?

A. Well, death can occur from ventricular fibrillation whether the patient has mild symptoms or whether he has severe symptoms or whether he has had no symptoms. One patient that I recall had a ventricular fibrillation with never any evidence of coronary disease. This man happened to have this electrocardiogram taken, which is part of my teaching collection of electrocardiograms and that man subsequently swam half way across the bay when his condition was corrected, and I think, as a matter of fact, that electrocardiogram of that individual is in court. I think Dr. Rush has that, if the Court wishes to see it.

Q. Well now, angina pectoris is a degree of heart disease; is it not, Doctor? A. Is what?

Q. Is a degree of heart disease?

A. It's a symptom of heart disease. It's the pain which is produced when a heart doesn't get enough blood to do its proper job. It's a symptom.

Q. Can you state, Doctor, from anything that you know in this case, that Dr. Lyons did not have an attack of angina pectoris prior to the infliction of the superficial injuries to the face?

A. I think that the evidence is strongly against the fact [266] that he could have had. I think there are many, many things that we have been discussing, the medical examination ahead of time, our accompanying him when he climbed the sand hills,

(Testimony of Dr. Francis Chamberlain.)

and watching him, and being right present in our small world, which a ship with six men on constitutes, when he did this terrific feat of handling a 200-pound or so marlin, I think that the fact that his wife, who lived close to him never saw him under any circumstances when he showed that he had any sign of pain, or took a nitroglycerin pill, and so on. I think all of those evidences—I can't say he absolutely did not have, or that he hadn't had, but certainly there is no evidence that would make me feel that he had, and I think that considering all those bits of evidence, I would say that it is my belief that he did not have angina pectoris.

Q. The same would be true of an attack of coronary insufficiency, Doctor?

A. Angina pectoris is a symptom associated with coronary insufficiency. In other words, when coronary insufficiency—it's actually marked so, and the heart muscle doesn't get a proper amount of blood for this transient pain which we call angina pectoris.

Q. Now, Doctor, what are the main precipitating causes of ventricular fibrillation?

A. Well, we don't know a great deal about the major precipitating causes, for one reason ventricular fibrillation is usually [267] fatal, and ventricular fibrillation therefore is suddenly fatal, and most patients don't die when a doctor is as close—for example, as Dr. Rush was to Mr. Lyons, so that although ventricular fibrillation is considered to be a

(Testimony of Dr. Francis Chamberlain.)

rather common cause of death, our information on that point is pretty sketchy, and I would say that the precipitating factors may occur wherein provocation—for instance, patients who are known to have ventricular fibrillation and died while an electrocardiogram has been taken, that is where those of an hour or more, and they die while electrocardiograms are being taken, and the rhythm taken upon a ventricular fibrillation has been shown to have been provoked by any of the factors which can produce any of the abnormal heart rhythms from anything which would act as a stimulant to the nerve system, major stimulant; fright, shock, collapse of the blood vessels or collapse of the circulation to the point where a person gets shock even from severe infection such as severe pneumonia has been shown to produce death by the mechanism of ventricular fibrillation.

Q. Does focal heart damage produce ventricular fibrillation? A. Yes; I believe it does.

Q. That would also fall in the term “focal heart disease”?

A. Yes; and it may be precipitated by an underlying extraneous precipitating cause—underlying, there may be underlying heart disease of a coronary nature which is probably a predisposing factor in any given case, or which may be a [268] precipitating factor in any case.

Q. And coronary insufficiency may be one of those precipitating factors; is that right?

A. Yes. I should say, that in patients who have

(Testimony of Dr. Francis Chamberlain.)

angina pectoris—a percentage of them who die suddenly, that it is felt that ventricular fibrillation may be a factor, may be a *modus operandi*.

Q. Doctor, in answer to a question as to your opinion as to the cause of death we are speaking of, were you speaking of medical shock or a shocking experience?

A. Well, I was speaking of medical shock, and, of course, a shocking experience is one of the predisposing factors of medical shock. Now, I was speaking of medical shock where, due to this beginning of circumstances and mechanisms, I described the other day, the blood pressure falls and the blood pressure stagnates in the present great reservoirs in the digestive tract, and the little, tiny vessels throughout the body, at the same time part of the fluid, part of the blood, exudes through the little, tiny capillary walls so that some of the fluid in the blood leaves the circulating blood, so that the whole sum and substance of this—so that the amount of blood in the active circulation—the blood going through the stream—in other words, through the main vascular stream decreases markedly in amount.

Q. Does that result in ventricular [269] fibrillation?

A. And that whole condition is called medical shock, and I might say that there is still a great deal of research going on on this thing, and that all the mechanisms and all facets of what constitutes it and what causes it I have never completely understood, but I have mentioned some of the factors

(Testimony of Dr. Francis Chamberlain.)

which are generally accepted as contributing to the picture.

Q. Then the decrease in blood pressure results from ventricular fibrillation; is that correct, Doctor?

A. The decrease in the amount of blood which comes to the heart can be one of the major factors and I won't say that produces ventricular fibrillation, because you can get ventricular fibrillation produced without any previous shock at all, but shock is one of the predisposing factors. A simple virus in fact, or influenza, I have seen ventricular fibrillation, I have seen it happen from a medicine, like quinidine where the patient has had to take quinidine, and it would produce ventricular fibrillation without any shock at all, but a shock is a factor, and I think that there were several things in this situation which could have produced ventricular fibrillation—or it doesn't necessarily have to be ventricular fibrillation. The rhythm that I believe was present here, was of a very rapid, ineffective rhythm, judging by the fact that this man was pulseless, that he breathed a much longer time than is present in the usual death, and judged by the fact [270] that Dr. Rush, who got there probably very quickly had his hand on his chest and felt this purring sensation, all of which are unusual, so that to me, he could have had one of the number of abnormal heart rhythms, like an auricular tachycardia; it is usually a very benign situation unless the rate is very rapid, that happens to be the kind which my wife gets when she jumps into cold water. If it occurs at the rate of

(Testimony of Dr. Francis Chamberlain.)

300 beats a minute, or if it occurs at the rate of 130, it is just a damn nuisance, and it is just an auricular flutter in which the ventricles may beat 300 a minute. There are occasionally patients that have those auricular fibrillations. And ventricular fibrillation is a tachycardia where the rate is around 300, where the rate is so rapid that unconsciousness—and this scheme of events—I think all one can conclude from the evidence here is that it points to the fact that there was a very rapid abnormal rhythm, and ventricular fibrillation is certainly one possibility, and we think of ventricular fibrillation because after all the man died, and I think more people have happened to be having electrocardiograms taken during sudden death when ventricular fibrillation was shown than when some of these other rhythms were shown.

Q. Doctor, when you have a ventricular tachycardia, is there a pulse?

A. There is not a pulse perceptible at the wrist, if the rate—if the ventricular rate is rapid, depending on how [271] fast the rate is—the ventricular rate is as fast as 300 a minute, pulse and consciousness are usually present. If there is enough blood getting to the brain to maintain consciousness, one can usually—not invariably—but one can usually by very careful feeling find a pulse at the wrist, or I should say by expert feeling; that isn't always true.

Q. In ventricular flutter, do you feel the heart beat, or does he have a pulse, I should say?

A. No; ventricular flutter is a sort of disputed

(Testimony of Dr. Francis Chamberlain.)

rhythm, there are some that don't describe it, so I use the word for a regular ventricular rate in which the ventricles beat at a rate of about 300 and the auricles usually beat at the same rate, and that, by definition, is a rapid rhythm, so that if one subscribes, and I should say that about half of the authorities, that they are—that they believe that you should call it that, that is a technical term, and in dealing in terms one should call a ventricle flutter where the ventricle dominates the beat, and the rate is about 300. Some individuals will call that a rapid ventricular tachycardia; you asked what I would call a ventricular flutter, and I don't know which is the proper term. I use one one time and one the other, but we mean the same thing. The fact is that the body is the same, that the heart beats so rapidly that it can't do an effective job. The heart is— [272] the time between beats is so short that the heart can't fill up with blood, and even though it is a very good beat, the time is so short, so small, that the heart beats before it has enough blood to be able to propel enough of a jet or to reach the brain and effective vessels or to reach the wrist.

Q. Then, there would be a lack of blood pressure, as I understand it, Doctor; is that correct?

A. Yes.

Q. Now, is it possible to have a cardiac standstill that results from a ventricular fibrillation or a tachycardia?

A. Well, when the heart stands still, it stands still.

(Testimony of Dr. Francis Chamberlain.)

Q. We have a cardiac standstill for a short period of time, that affects you, but not sufficiently?

A. Yes, you have a cardiac standstill and then that may be followed by a series of other rhythms. It isn't usual, but it can happen. Most of the patients I have seen who have cardiac standstill—and again we have to have the electrocardiograph on them when that happens, and I would say that over 95 per cent of the patients that are on electrocardiograms that I have seen with cardiac standstill, don't ever develop any other abnormal rhythms.

Q. Doctor, with ventricular fibrillation, can you hear or feel the existence of that condition?

A. The only thing that you can feel is—there has been [273] described a purring sensation in the chest, which can be described with electrocardiograms first taken; Dr. Rush described a sort of a cat's purring sensation. They don't all have that, but they may have it, which purring sensation, I, myself, have felt.

Q. That would be an objective finding or demonstration of the ventricular fibrillation?

A. Or a rapid, ineffective—rapid, ineffective rhythm, because that same purring can be felt with any extremely rapid abnormal heart rhythm. It isn't specifically for ventricular fibrillation. I should say further, to elucidate this, that ventricular fibrillation is a sort of a chaotic situation from the standpoint of the rhythm, and it's quite mixed. The electrocardiographs will show that some of the beats according to the electrocardiogram appear

(Testimony of Dr. Francis Chamberlain.)

to be extremely ineffective, and the other beats are effective, so that it is a mixture. The heart being active with a very rapid beat, and sometimes it looks as though the heart did have a momentary stop and dropped three or four beats, and maybe it has a few beats when the heart did not reflect the electrical stimulations in the proper order, that sort of situation exists. In fact, the only sequence I have seen of electrocardiograms which show ventricular fibrillation suggests that that sort of thing is happening, there is some regularity, and there is rapidity and again you—you see, [274] in electrocardiograms all we are looking at is the example of the electrical current stimulating the heart. But actually, we are not a hundred per cent sure of how the heart responds, and so there is some guesswork in all this.

Q. Doctor, are not medical shock and congestive failure diametrically opposed to each other?

A. No, not necessarily. In heart failures there are two great theories of the mechanism of the heart failure. One is the forward failure and one is called the backward failure.

Now, it has generally acknowledged due to the work of Tensley Harrison some 20 years ago that heart failure did represent backward failure, and I am trying to simplify it, may I say, if a heart portion, like the left ventricle was unable to do its job, so that the blood was unable—the blood that was in the left ventricle was continually being poured out, and the blood through the veins,

(Testimony of Dr. Francis Chamberlain.)

and so that the blood backed up—piled up behind the heart, and produced engorgement of some of the lung vessels—some of the vessels, and if the engorgement was produced in the vessels of the lung, the person had heart failure, manifested by breathlessness and frothing of the mouth, and so on and so on. But it became obvious in the past 10 years with more study, that the thing was a simple one, the manifestations, one of the bits of evidence that made them realize this was probable was the mechanism of the death in shock, from patients [275] who died of infectious diseases, where, if infectious diseases might develop shock, and at the same time they developed manifestations of heart failure, and the theory then was reversed. In other words, if the heart didn't deliver enough blood to a certain organ to give it its proper oxygenation, in all probability there were certain things that occurred in that organ, one of which is the inability of the capillary to handle the—maintain the proper tone and to maintain their proper function, so that the liquid material from the blood can ooze out through those capillary walls, which may become porous, and so that even other situations where there is an inadequate amount of blood from the heart, that the situation—the clinical condition of congestive heart failure may develop, and that is—generally it's accepted. Now, when a person gets congestive heart failure, he may have backward heart failure or he may have forward heart failure,

(Testimony of Dr. Francis Chamberlain.)

and the consensus now is that the greater majority of the instances of heart failure are forward heart failure. In other words, the tissues which should be nourished by oxygenated blood which the heart is pumping to it, in some cases all of it details around in some way the inadequate oxygenation or inadequate blood flow, sometimes working through pressure mechanisms which are intermediated through nervous reflexes, bring about this sequence of events. [276]

Q. Doctor, what is the time element that is involved where you have oozing through the tissues to produce this—say, pulmonary edema and enlargement of the liver?

A. Well, I understand that it can come pretty rapidly. Now that again, I am not a pathologist, and I don't usually see these things, the liver immediately after a sudden death, and the heart immediately after a sudden death, so I am—I have conducted—I have discussed with the chief pathologist of our medical school, asking him how long it takes, and he told me, just as Dr. Lehman told us, he told me that it was about four or five minutes; I think Dr. Lehman said seven or eight, or something like that, but he is the pathologist, and I am a clinician, and I follow my patients when I can to the autopsy table, but I have to rely on other persons for all the evidence about this. I have to get a little help.

Q. Doctor, I want you to if you will, in the future limit your answer to those things you know

(Testimony of Dr. Francis Chamberlain.)

of your own knowledge in this case, not what you have been told, except insofar as it is in evidence in this case. Now, could you have ventricular fibrillation of the heart or this tachicardia and a complete dropping of blood pressure; you do not normally have pulmonary edema manifest itself in a short period of time; do you, Doctor?

A. Well, one could have. On my own experience, I can rely on my experience to state, not again how big the liver is [277] going to be, or what that is going to show. When you saw it, did it have evidence of congestive failure which were described here in Dr. Rush's deposition, namely fluid, frothy fluid coming from the mouth somewhere, a pinkish tinge, is a manifestation of congestive heart failure, and that can occur in a very short time, in the course of any of these clinical conditions.

Q. But can that occur in a very short time from ventricular fibrillation?

A. It can occur in a very short time from the presence of any rapid ineffective heart rhythm, yes.

Q. Notwithstanding the fact that there is no blood pressure?

A. Yes, due to the mechanism of forward heart failure.

Q. And that is the oozing through the tissues, as I understand it, to put it in the laymen's language?

A. Yes, I can say that I have seen that more in severe infectious diseases where the heart is per-

(Testimony of Dr. Francis Chamberlain.)

fectly normal, and where the patient dies a cardiac death due to shock, and some abnormal heart rhythm wherein congestive failure may be an important factor, and where, as soon as the blood pressure drops down, the patient becomes unconscious, they are known to live for some period of time, in a comatose condition, and a heart which appears to be entirely normal can develop clinical manifestations of heart failure.

Q. Now, do you have any knowledge about the liver, about [278] the time it takes to enlarge that?

A. My knowledge of that is based on my quizzing my professor of pathology, and I think the testimony here of Dr. Lehman supports that.

Q. Now, isn't an enlargement of the liver and pulmonary edema a sign of acute heart failure?

A. Yes. No, I should say the enlargement of the liver can occur from a great many causes; actually it isn't just a manifestation of heart failure, but I'd say that the heart failure can cause an enlargement of the liver. It is one of several indications to have enlargement of the liver and congestion of the lungs. It's one of the several causes of congestion of the lung.

Q. Pardon me, but I believe you stated that as being a fact?

A. In this particular case, I think that is the *modus operandi*, yes.

Q. Now, Doctor, in answer to a question as propounded to you, you answered that the man died as a result of the gunshot wound to the face. Now.

(Testimony of Dr. Francis Chamberlain.)

by that statement do you mean to infer to the Court that the injuries to the face were in and of themselves sufficient to cause death?

A. Well, I think that the wounds to the face in addition to the reaction associated with the wounds of the face were sufficient to cause death.

Q. That is not my question. My question is, do you mean to [279] infer that the powder burns and scratches were of such severity that they in and of themselves with no other contributing factors would have resulted in death?

A. Well, if you assume as I would that—when a person gets—I should say this, that if this man had been anesthetized and in a complete—deep coma or something and got that much in the way of shock, I am not a hundred per cent sure, perhaps, it would have. But if you mean from the standpoint of did the shot go into the brain and cause his death mechanically due to the bullet penetrating the brain, which was what I immediately thought in looking at him, because to me—well, it didn't look like scratches, and I thought that his face was pretty well shot up—I mean, my immediate thought was sure, the gun went off and that, but I think that the gunshot I have described, the gunshot causing some of the shells to hit his face, the powder, the burns that he must have had, and the emotional reaction to the whole thing, I think a combination of all of these is quite sensible as an explanation.

Q. Well, Doctor, my question itself is whether

(Testimony of Dr. Francis Chamberlain.)

these injuries to the face were in and of themselves sufficient to cause death, by mortally wounding him?

A. Well, I think these other things that happen to the nervous system in response to the shot, all are part of the picture, I mean to say that if a fellow is shot through the [280] heart, does he drop dead by the bullet itself, and it is not necessary for the bullet to stop the heart, but he bleeds to death, but I think the chain reaction which was started off by this is a very sensible one.

Q. Doctor, did you make a close examination of the injuries to Mr. Lyons' face?

A. Yes, I made a pretty close—well, I am sure I studied his face and looked at his face a few minutes.

Q. Where and when?

A. Within—I got to the body within—I suppose 20 to 30 minutes after the time of his death, and then a good deal later on, because we were there hours and hours waiting for the police, and the doctor to come out for the inquest, and I was there at least half of the time.

Q. Doctor, as a matter of fact, they were merely superficial scratches on the face; were they not?

A. Well, they didn't look superficial to me at the time. Like I said, I felt that was about what it would look like if a shotgun shell went through the skin, and I expected, from my observation of the body and the blood on the outside and so on,

(Testimony of Dr. Francis Chamberlain.)

that the shells had gone in and penetrated his brain.

Q. But that was not found to be the case; was it?

A. Apparently not, but I thought at the time, I was very interested, I thought that the shot had gone into his brain. [281]

Q. Did you observe whether there were any pellets under the skin? A. No, I didn't.

Q. Could you tell whether these scratches on the face were caused by falling through the mesquite bush, or caused by the discharge of the shotgun?

A. Well, certainly I have seen a good many scratches from brush, and so on, and it was my reaction, when I saw this man, that this was a shotgun in the face.

Q. That isn't my question, Doctor.

A. I didn't think that, the question of his having had his face in the mesquite bush didn't enter my mind, I didn't consider that as a possibility.

Q. Well, isn't it a possibility that some of these scratches on his face were caused by his falling through the mesquite bush?

A. Well, I suppose it's possible.

Q. Mr. Lyons was lying under the mesquite bush; was he not?

A. He was lying underneath the bush, but his body had been moved a little ways for the purpose of his artificial respiration, but the time I saw him, he wasn't lying right under the mesquite bush.

Q. Now, Doctor you are characterizing these

(Testimony of Dr. Francis Chamberlain.)

wounds do I understand your testimony to be that they were of a serious nature? [282]

A. I thought so.

Q. Doctor, haven't you known and read of many cases where shotguns have been accidentally discharged and a man has lost his foot or leg or arm and hand and has not resulted in death?

A. Yes, I haven't seen many though as a cardiologist, and I don't see trauma, I don't see many gunshot wounds, I did in my earlier training, but I haven't seen a gunshot wound, other than Jim Lyons', for 20 years. I don't think I am in a position to describe a gunshot wound or something of the sort.

Q. Doctor, the wounds that you did examine on Mr. Lyons' face at the time of this occurrence, how would you compare them with reference to the degree of pain with the injuries that Mr. Lyons suffered in the automobile accident that has been testified to?

A. Gee, I don't know. I don't recall enough of the details of the automobile accident. All I recall is that he had a crash and broke some ribs and I don't know, actually, the intimate details of that. I think perhaps I slept through a little of the testimony as not being important.

Mr. Maguire: Doctor, that's in the medical record, would you like to take a look at it? It's Exhibit 18.

The Witness: May I?

(Document handed to witness.) [283]

(Testimony of Dr. Francis Chamberlain.)

The Witness: Well, I guess this is all on the first page under—it's the medical insurance form, what injuries caused disability, and it says, "multiple contusions, abrasions, lacerations, fractured nasal septum, fractured ribs, hemothorax, gout." Now, that's all it says.

Q. (By Mr. Kriesien): Is there adequate information, for you, Doctor, to be able to state whether the pain suffered as a result of the—of that accident would be greater than that suffered from the lacerations of the face?

A. I have no way of knowing, but he must have been burned, for one thing, which is a painful affair. The severity of the trauma isn't necessarily closely related to the severity of the pain. I think that it's impossible to ask a person to say if this hurt, other than I know that I felt that the emotional trauma associated with the gunshot wound was an important factor, because this man's belief that his boy, who meant more to him than anything in his life, I should say hunting life, even though the women say it is dangerous stuff, and you shouldn't do it, I think is a strong emotional factor here, but I can't say that—oh, because of error, I don't think anybody can say with any certainty, whether there would be any shock associated with it. The degree of shock roughly parallels the degree of trauma, but the association isn't an expectant one.

Q. Well, isn't it a fact, Doctor, that the pain varies between [284] individuals? A. Yes.

(Testimony of Dr. Francis Chamberlain.)

Q. What is the basis for your statement, or do you have any facts upon which to state that Mr. Lyons must have had a good deal of pain?

A. Well, the appearance of his face.

Q. I see. But the extent of the pain from that type of an injury would vary in everyone; is that correct? A. Yes.

Q. Now——

The Court: May I suggest we take a little recess? The doctor has been talking here for about two hours. You are probably getting a little tired, Doctor?

The Witness: Thank you.

(Whereupon, a short recess was had.)

The Court: Proceed.

Q. (By Mr. Kriesien): Doctor, I'd like to have a specific answer to this question. Is it your testimony that the pain suffered by this individual, leaving out the other emotional factors of anguish and fear, could have or did result in this man's death?

A. I think that the pain alone, without the anguish, would have touched off—without anguish would have touched off the chain of events—would have touched off the rhythm, and I might say something else about this question of pain, [285] and that is the superficial or exquisite area of pain that is generally specialized, which is one of the body's protections to resist it, whereas the nerves

(Testimony of Dr. Francis Chamberlain.)

that are deep in the body, such as when you get a shot, and the nerves that are deeper in the body are considered conveyers of pain, and it is common knowledge, for example, that when a doctor gives a patient the needle in an area, to shoot, he jams the needle in the skin very quickly; from there on, he can flounder around at length in order to get the needle in the vein or artery that he is trying to get it into, and the patient notices it only a second, in respect to the pain, so superficial injuries of the skin are usually quite important.

Q. And we are speaking in terms of these superficial injuries now, is that correct?

A. Yes, since that is what the autopsy states, that they were superficial injuries. That's what it says, at least they didn't go into the brain.

Q. All right. What about this anguish reaction you were speaking of, could that alone have resulted in death?

A. Anguish alone can produce a chain of events which can result in death. The patient—I mean it isn't very common, but there is plenty of it on the record, scattered cases here and there, where a patient, from an emotional reaction of joy or anguish suddenly dies, in which case the mechanism is usually one considered to be of some abnormal rhythm [286] developing in the heart. Again, there is a lot of guesswork as to this, because you don't have all the gadgets that shows what the pressure is doing, or what the heart is doing, because sudden deaths are unexpected.

(Testimony of Dr. Francis Chamberlain.)

Q. Now, Doctor, you used the words "It was not a common situation to result in death," is that true of superficial injuries, that they do not commonly result in death? A. Yes.

Q. Now, Doctor, may I ask you this: What would be the time element involved, taking into consideration, say the fear element; the anguish element; the pain element, up to the time of the individual losing his consciousness?

A. I assume that it would be rather short in this instance, because I assume with what Dr.—with a doctor 50 yards away, he would have cried out if he had known something was wrong, which he didn't. But the time it takes for something like that to develop, and for the shock to develop, for the abnormal rhythm to develop is extremely variable. It might take five minutes or it may be longer, such as in an operation, there is shock which occurs three hours after the operation is over. Sometimes it occurs immediately.

Q. Does it occur immediately through the sequence of events that you have named, rather concerning the pooling off of the reservoirs and adrenalin going to the blood stream there, that chain of events? [287]

A. Sometimes it may occur very rapidly.

Q. By very rapidly, what do you mean?

A. Within a period of a very few seconds.

Q. I see.

A. The common—we all see the ordinary fainting attack which encompasses part of this mech-

(Testimony of Dr. Francis Chamberlain.)

anism, the ladies—the lady is told her husband dies and she collapses. I mean those things can happen very quickly.

Q. In your answer, you have placed some considerable emphasis on the time element involved; assuming that the fact was that there was evidence of pulmonary edema at the time that Dr. Rush arrived at the body, would that change your opinion?

Mr. Maguire: I think that assumed something that is not proven. I don't think there is any evidence that there was pulmonary edema at the time he first arrived.

The Court: I don't think there is.

Mr. Kriesien: This is cross-examination, your Honor, and I have not had an opportunity to cross-examine Dr. Rush on these facts. I am not asking him anything except if that is established a fact.

The Court: All right, I will allow it.

The Witness: I am sure that allowing—I would expect it to take a few minutes to get this pulmonary edema. I wouldn't expect it to occur in a half minute. I don't know—I should—I think it is hard to be pinned down to maybe [288] three minutes or longer, but we have evidence that there was blood flowing through the lungs and it is sort of an indirect part of it the frothing, there was blood flowing to the center in the brain, because he breathed much longer than the usual patient who dies, and then there was other evidence that the blood was flowing quite a while, because this man,

(Testimony of Dr. Francis Chamberlain.)

as pointed out, lived long enough to have swelling develop around these areas of the trauma.

Q. Well, Doctor, again you are getting into another feature. Is it your testimony now, that the blood was flowing through that man?

A. Yes. the blood flows, in the presence of a rapid ineffective abnormal rhythm, but it's a matter of degree. The blood flow is markedly cut down, and the head pressure that gathers in between the stroke and the relaxing between the strokes is missing, but there is blood flow. There is a critical situation in which there is some interference with the blood supply to the legs that applies to the operation of the aorta where some individuals even live normal lives and even, I have seen the kids play football where the column of blood is interfered with in its flow to the legs, and where one can't feel any pressure in the arteries of the legs or in the arteries of the thigh, and yet where these legs continue to work. These things again, are a matter of degree. The fact that you can't feel any pulse doesn't [289] mean that there was no flow of blood. It means that the usual head of pressure is not there.

Q. Maybe I misunderstand you, Doctor, I thought you said there was no blood flow when a man is in ventricular fibrillation or tachicardia?

A. But no blood pressure does not mean there was no blood. There is no blood pressure in these kids that lead normal lives without an open column of blood from their heart down into the legs, and

(Testimony of Dr. Francis Chamberlain.)

yet they walk and run and do all these things and their feet are warm, and so on, but there is no blood pressure.

Q. Doctor, can artificial respiration——

A. I should say this, you could get blood pressure if you poked a needle in the vein, you could record blood pressure of these tiny vessels but you can't by the ordinary means. Excuse me.

Q. I lost my train of thought, Doctor. Oh, Doctor could artificial respiration, rather vigorously done, produce pulmonary edema?

A. No, I don't see how it could. If anything, it might help, because artificial respiration would increase the oxygenation of the blood and the mechanism of pulmonary edema; as I mentioned before, there are two methods, it's either too much blood that gets to the lungs, it's backward mechanism due to too little. The forward is the most general. [290]

Q. Well, assume the forward mechanism, and artificial respiration is being applied, do I understand that that would not force some blood out into the lungs?

A. Well——

Mr. Maguire: Just a minute. May I ask you a question? You don't mean to the lung cavity but into the blood vessels?

Mr. Kriesien: Let the doctor answer.

The Witness: Artificial respiration will help to a certain degree through the suction pressure and then the subsequent suction to drive a little more blood to the lungs, but the main thing it does is to

(Testimony of Dr. Francis Chamberlain.)

cause a more effective type of respiration, which would let a greater amount of oxygen get to the lungs. The stertorous breathing that is associated with these states like this, that we mentioned, the stertorous breathing is a rapid, shallow breathing, not necessarily ineffective breathing, and if the stertorous breathing is a rapid, shallow breathing, we sometimes help nature by increasing the depth of respiration. I am not sure that the record—whether Dr. Rush applied his artificial respiration before the stertorous breathing stopped or afterward, but that is the general policy and would be the policy; certainly the sensible thing to do is to use it under both conditions, especially when the breathing stopped.

Q. Doctor, is there any particular time for stertorous breathing to start? [291]

A. Yes, stertorous breathing usually develops within a few seconds' time, usually after 10 seconds after an effective beating of the heart stops. The stertorous breathing is motivated by the blood center in the brain, the respiratory center in the brain, and once the respiratory center of the brain develops an inadequate supply of blood, stertorous breathing starts and consciousness is gone, and they occur usually quite close together. I have been talking to patients and they looked perfectly all right and suddenly start to breath (indicating), I have—that sort of thing I have seen it happen within two or three seconds of the time they have been talking to me. Then, the thing about stertorous breathing, though, is that it usually don't last over half a

(Testimony of Dr. Francis Chamberlain.)

minute, then it stops. Which was not the situation here. It stops and the patient is dead.

Q. Doctor, just a few more questions. I noticed that the electrocardiogram taken of Mr. Lyons in February that is in evidence in this case was taken some two weeks before this occurrence on February 3rd, 4th, and 5th——

A. I thought it was taken within a week of it. I thought it was on the 3rd and that the accident occurred on the—what was it, the 10th or 12th?

Q. I am sorry, I withdraw that. I was in error. On the date of this strenuous fishing, the marlin for half an hour, does that bring into play the muscles that you have described [292] as the ones causing the fatigue pains?

A. Fatigue pains, we are talking about fatigue that doesn't affect the heart. On the other hand, fatigue pains that result from fear—is that what you mean?

Q. I mean the type of fatigue pains that allegedly Mr. Lyons had?

A. Well, the type of fatigue pains which I think the record suggests that he had, supplemented by Mrs. Lyons stating that were at the end of the day, and evening, about the time he was ready to go to bed, that type of fatigue pain can come along—in that type of fatigue pain, in an individual, a typical busy businessman who is worn out, who is exhausted from his work, the characteristic thing would be that he would come home from this pattern of pain at the end of the day, but he would

(Testimony of Dr. Francis Chamberlain.)

go on the hunting trip and he had gone on hunting trips and carried a buck on his back, and so on, and feel wonderful all week end, and have some—have none of the more common fatigue pains, the more common cause of heart failure, far and away, I'd say the odds are ten to one that this pattern of chest pain, of the radiation to the arms associated with fatigue is an emotional type of fatigue, and not a physical type of fatigue. I rarely ever see a day laborer who has worked all day, and he comes home, and he says, I got a pain in my chest, he gets that pain in his back or something of that order, but it's far and away [293] the most common is emotional fatigue.

Q. Did Mr. Lyons evidence any pain such as arthritic conditions of the back during this half-an-hour play of the fish?

A. He had no complaint, except that the fish got away. He made no physical complaints whatsoever, nor did he register any symptoms, nor did he say anything or register any sign of fatigue.

Q. Now, Doctor, assume that the injuries to Mr. Lyons occurred after the onset of the heart attack with——

A. Assume that what, now?

Q. Assume that these injuries occurred after the onset of the heart attack from the autopsy report and from your observation of this individual and knowledge of this case history, would you have an opinion as to the precipitating cause of the heart attack?

(Testimony of Dr. Francis Chamberlain.)

A. No, if that had happened, I would assume that it was one of those instances of a man who just suddenly dropped dead due to a heart attack, but again I would say I don't feel that is pertinent to this man, because the findings in the autopsy that were described, I don't think—I don't think justify that. I don't think again there is any evidence in that autopsy report to suggest that this man had any more in his heart than the ordinary man 49 or 50 years of age would have. [294]

Q. But, Doctor——

A. Am I beating around the bush too much, answering your question?

Q. Doctor, from that autopsy report, I believe you testified earlier didn't tell you whether the arteries were almost entirely diminished in caliber?

A. No, I think that is such an important thing in medical parlance, that if they were almost entirely closed, or were closed, they would say so.

Mr. Kriesien: That's all, your Honor.

Redirect Examination

By Mr. Beebe:

Q. Doctor, from the clinical findings and what you have observed, do you have an opinion as to whether it is likely or probable that most coronary arteries are substantially closed?

Mr. Kriesien: Objected to on the ground and for the reason that the witness testified on cross-examination that he could not tell the diminish-

(Testimony of Dr. Francis Chamberlain.)

ment of the arteries of the man's heart, except through assumption, and assumes facts not at issue.

The Court: The objection will be sustained.

Q. (By Mr. Beebe): Now, in connection with this matter of blood flow after the cessation of any effective heart rhythm, I believe you discussed venous or arterial flow. Now, how [295] about venous flow, what does the venous blood flow depend upon; does it depend upon heart action?

A. Yes, it depends to a certain extent upon heart action. It depends a good deal on movements of the muscles of the body, the muscular milking action of the muscles moves the blood from the veins up into the heart. It also depends on the state of the tension of the veins, the arteries and the capillaries at the time, since as mentioned before, if the little blood vessels suddenly dilate due to some unusual stimulus, it's like the water appearing to move in a river which is wider and smoother is much slower, and a great deal of the blood would stagnate there in these areas and not get going to the heart, so that the venous flow would be diminished. But under ordinary circumstances there are several things—I think three things mentioned in detail, the output of the heart, which pushes the blood all around; the milking movement of the muscles of the body and of the muscle tone of the little vessels themselves. I think those are the three major factors.

Q. Well, Doctor, would blood flow from the

(Testimony of Dr. Francis Chamberlain.)

movement of the breathing cause some venous circulation?

A. Yes, the movement of breathing—the lungs work sort of as a bellows pumping some blood out and having other blood come in, so the blood is capable of a little traveling along the way, and the blood gets along, so therefore the blood [296] from right to left tends to go through the lungs and in the course of the circulation of the blood, and there is some increased blood—I don't think it will amount to a great deal, but I think that artificial respiration—I am reasoning physiologically—I don't know of any experiments that show that, but the blood going out from the heart, it wouldn't by itself correct the situation, but it would probably help some.

Q. Doctor, in a case where there is any significant aortic valve lesions or disease, is there a sign of it indicating that known as enlarged heart?

A. Is there a sign?

Q. Yes. A. Yes.

Q. Is that one of the signs of significant aortical valve lesion or insufficiency?

A. Yes. If there is an important degree of insufficiency of the aortic valve, the heart is like a pump, like a leaking pump, it has to do more work than usual, and if there is an important degree of the insufficiency of the aortic valve, the heart gets larger.

Q. Now, is a description of a heart with a left ventricle slightly hypertrophied, is that sufficiently

(Testimony of Dr. Francis Chamberlain.)

enlarged in your opinion to have a sign of aortic insufficiency?

Mr. Kriesien: If the Court please, I will object to [297] that on the ground and for the reason that the autopsy report does not indicate the degree of hypertrophy.

Mr. Beebe: It says "slightly."

Mr. Kriesien: Well, slightly can mean any degree.

The Court: I think I will allow the question.

The Witness: Well, I should say the clinical method of telling how big a heart is, and the most delicate method of telling whether the heart is enlarged or not, is the electrocardiogram which was taken just before death, a week or so before death. The electrocardiograph is the most delicate one. One doesn't have much enlargement of the ventricle, and the electrocardiogram can tell a little greater degree of enlargement for the left ventricle or to the heart in general.

Q. Well now, did the electrocardiogram taken on February 4th indicate any enlargement of the heart?

A. No, it shows no evidence of hypertrophy of the heart.

Q. Now, Doctor, I have just two more questions. In your cross-examination, you were asked about coronary insufficiency. Now, I wonder if you would tell us about that term particularly with reference as to whether there is more than one kind, and with respect as to whether it is a relative term?

(Testimony of Dr. Francis Chamberlain.)

A. Well, coronary insufficiency means that the coronary vessels don't pump enough blood to the heart muscles to be sufficient, and by that to be sufficient we assume to be [298] sufficient to carry out a person's body functions. A patient with severe coronary disease—coronary insufficiency to the point where he can't do anything without pain—where some of them get 20 to 30 attacks a pain in a day lying in a hospital bed, there are other individuals who have sufficient collateral coronary circulation or who have—I should say—whose coronary disease is such that it takes a good deal of exercise, climbing a hill with a deer; pulling a big marlin—if I can get a plug in—these real strenuous exertions which would bring on a type of pain. But again coronary insufficiency is predicated on two things. One is on the amount of coronary thickening. Another one is on the degree of collateral circulation. Some individuals develop wonderful collateral circulation to the point where they may actually have several stationary blood vessels and lead normally active lives and never have any pain manifestations of coronary insufficiency, so it is a physical assistance based on the needs of the heart for the amount of blood which is going out to the coronaries.

Q. Is what you have been describing, is that an organic coronary insufficiency or any of those or all of those? A. What I have been describing?

Q. Yes, just now.

A. Well, at the start, the first one that I mentioned, where a person has the coronary pain in

(Testimony of Dr. Francis Chamberlain.)

the course of heart disease, that is coronary insufficiency. On the other hand, you can [299] have coronary insufficiency without any disease whatsoever. The individual—and we doctors in this room have all seen them—the individual who has a perfectly normal heart, whose heart beats 250 to 300 beats a minute or—I should say this—200 to maybe in the order of 200 and 260 beats a minute, unusually rapidly, so that he can still maintain consciousness, he has coronary pain.

Q. Well, is this coronary insufficiency?

A. Yes, and he may have this without any heart disease whatsoever. It is the exception to find an individual with a perfectly normal heart to, under circumstances where the heart has a big job to do, can get enough blood to where coronary insufficiency may not develop.

Q. Now, Doctor, in your practice, have you had a special interest and made a special study of any forms of sudden death?

A. Yes, that has been one of my chief interests in the field of cardiology.

Mr. Kriesien: If the Court please, I object to that question, on the ground that it is not correct in redirect examination. The man has brought forth all his qualifications before.

The Court: Overruled.

The Witness: I beg your pardon?

The Court: I overruled, you may answer. [300]

The Witness: During my period—in my sixth

(Testimony of Dr. Francis Chamberlain.)

year of training, I started a special study on the heart and sudden death, and especially with the type of sudden death or sudden cessation of the heart beat or where there is a syndrome in the heart suddenly stops its effective beating and in this particular situation the heart, after a period of time, when the patient is unconscious and after the stertorous breathing starts and stops and the patient seems dead and the heart comes back again—it is not a very common condition, but I have studied it more than any other single type in my field, to that point where I have reviewed every case of sudden death which has been documented by electrocardiograms or clinical studies with the Presbyterian Medical Paper, the Massachusetts General Hospital in Boston, in all the private patient files of Dr. Paul White, at the University of California Hospital and at the San Francisco County Hospital. I have reviewed all the records from the time when electrocardiograms were taken, in all those, in addition to that, I think I am sure I have made—have been more interested in this problem of sudden ineffective beating of the heart than most cardiologists.

Q. That's all, your Honor, no further questions.

Mr. Kriesien: Nothing further, your Honor.

The Court: All right. May the doctor be excused?

Mr. Maguire: Yes, sir. [301]

Mr. Kriesien: I have no objection, your Honor.

The Court: All right, you may be excused, Doctor.

(Witness excused.)

Mr. Maguire: Call Dr. Rush.

DR. HOMER P. RUSH

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Further Direct Examination

By Mr. Beebe:

Q. Dr. Rush, you had told us before, something of the occurrences leading up to and after Mr. Lyons' death, and I don't believe you were asked as to at what point of time it was when the evidence of pulmonary edema was discovered, whether it was when you first arrived or afterward?

A. I would imagine I had been there probably a period of maybe two or three minutes before he began to show his pulmonary edema with frothing sputum coming from the mouth.

Q. Was it before or after you had commenced to give artificial respiration?

A. We didn't attempt any artificial respiration until after cessation of breathing, and this occurred before that.

Q. I see. Now then, Dr. Rush, is there any—a sign known to medical science which is available or can be observed upon observation when a man has on a shirt, or a close-necked shirt [302] with respect

(Testimony of Dr. Homer P. Rush.)

to whether there is any significant aortic lesions or aortic insufficiency?

A. There is one in respect to aortic insufficiency, there is a second in serious valve lesion, aortic stenosis in which it is, but it is in aortic insufficiency, yes, sir.

Q. What is that sign?

A. It is a marked increase in the contracted blood vessels in the neck. In fact, that pulsation is so marked that it usually moves the lobe of the ear with each heart beat, and when I was in Vienna, we were told that we should be able to look at a patient and diagnose it, because that was supposed to be most constant.

Q. That was when you were studying in Vienna, was it? A. That's right.

Q. Now, if the man is under exercise or exertion, would that be even more——

A. That would be more aggravated.

Q. Did you have occasion to see Mr. Lyons without a shirt, that is with his shirt off at any exertion?

A. He had no shirt on when he was playing the marlin, I believe he was completely shirtless, and I did observe him.

Q. Did you observe the signs that you have mentioned?

A. I never did—as I have said before, I never saw anything that made me feel Mr. Lyons was not in good health.

(Testimony of Dr. Homer P. Rush.)

Q. Now, Doctor, what are the signs of acute aortic insufficiency? [303]

A. Well, the one that we just mentioned, which would be associated with the phenomena, plainly so or a Corrigan pulse which merely means a marked increase in the pulse which is demonstrated by systolic pressure, with the diastolic pressure being below and the pulse pressure being great, and the marked fall in the diastolic pressure and sudden filling of the vessels give a characteristic feel to the pulse in the radial, which we speak of as a Corrigan pulse. Second, is a diastolic murmur which is heard over the basal portion of the heart and usually goes down the left side of the sternum. There may or may not be a systolic murmur, although usually there is. Third, this marked increase in pulse pressure that I have mentioned with a low diastolic pressure and usually some increase in systolic pressure. Fourth, the capillaries tend to show this marked pulsation greater to the extent of circulation than average, and as a result you can see pulsation in the nail beds and pulsation in the lips, with sort of a higher pressure to hold the pulsation back. I think those would probably be the commonest, these others are less important.

Q. Well, does the size of the heart have anything to do with it?

A. Enlargement of the heart, of course, occurs very early in aortic insufficiency, and it usually is of the left ventricle, and that is shown physically by a heavy or increased pulsation [304] of the beat

(Testimony of Dr. Homer P. Rush.)

which is in the area of the left breast, and then by percussion or palpation one can find if the heart activity goes out further to the left than would be normal, and it can also be shown up by an X-ray and shown up by an electrocardiogram.

Q. I was going to ask you, Doctor, is the enlargement of the heart, that you are speaking about in connection with aortic insufficiency, would that be diagnosable by fluoroscopic examination?

A. It would be.

Q. Now, is any enlargement of the heart—just any enlargement of the heart, a sign of aortic insufficiency? A. No.

Q. What is the nature of the enlargement, which muscle exists from it that is a sign of aortic insufficiency?

A. The first thing that is enlarged is the left ventricle, and that is because when we have aortic insufficiency, it's likened to a pump, this pump has extra work to do in order to force out more blood, because blood rushes back to it like the valve in a machine, and as a result the left ventricle gradually increases in thickness, and that we refer to as left ventricular hypertrophy, and that becomes more and more marked. Now, as that ventricle goes under additional strain, we can add to it some degree of dilatation in which it stretches the muscle, really, and that gives us a definite enlargement [305] of the left ventricular and aortic enlargement which could be told by an X-ray man or cardiologist in the first place without ever seeing the patient.

(Testimony of Dr. Homer P. Rush.)

Now, one can get a similar enlargement and high blood pressure and aortic stenosis, but one, the aortic insufficiency, it is one of the common causes for the so-called "big heart," the usual—the largest of hearts are markedly sclerotic, and the insufficiency, after this we can begin to get back pressure and the other chambers can be affected, but that is the first one.

Q. Now, Doctor, what are the signs of coronary insufficiency?

A. I think that question will be a little difficult to answer, because one could have coronary insufficiency with no findings. One can also have coronary insufficiency with findings of heart muscle strain, for coronary insufficiency implies that one is not getting an adequate blood supply to the muscle of the heart, so that our finding must be that if it would be anything, that would interfere with the pericardium or muscle action, the symptoms are commonly those of pain, chest pain of some type, but one can have the symptoms going along with heart failure, because it may be a slow developing insufficiency in which the heart muscle gradually just becomes weakened, and the body can't do its work, and then we have a congestive heart failure, so it can go—can follow really under any of three types or patterns. One would be the angina syndrome, [306] two could be the congestive syndrome, three, because of the poor nourishment associated with it, we could get myocardial infarction and changes in rhythm.

(Testimony of Dr. Homer P. Rush.)

Q. Now, Doctor, is it possible for this to be acute in coronary insufficiency in a heart, we will say, which is presently free from any diseases?

A. Yes, it is.

Q. What kind of coronary insufficiency would you call that?

A. Well, you'd speak of it—that is a functional insufficiency, it would be, say, the inner pathology of the heart function, if a man had a severe hemorrhage and lost, we will say, half his quantity of blood, so that there is not an adequate amount of blood circulation to keep the heart functioning, there wouldn't be any blood going to the coronaries and there would be insufficiency, physiologically speaking. If a man had shock, in which the blood pooled some place in the body so it couldn't get back to the heart, then blood couldn't fill up the coronary circulation and we'd have a coronary insufficiency that would be functional in nature. If one has a heart that is working very, very fast, and has a tachycardia of 250, we'll say, that is a fast heart, 250, the heart muscle not being able to get an adequate amount of blood to do that work, we would have a relative coronary insufficiency. I think we should keep in mind this is a relative term, and that the coronary blood supply depends [307] upon the difference in pressure between the pressure that is at the first part of the aorta and what the pressure is in the intramuscular spaces in the heart, because it's that change in pressure that lets the blood flow to the heart muscle and of course that is going to

(Testimony of Dr. Homer P. Rush.)

vary somewhat the heart beat. Now, coronary circulation is different than average circulation, inasmuch as normal circulation we fill up the blood vessels and the heart drops and we get the force in, but circulatory circulation, that's when we get the blood vessels released out into the arteries and the heart opens up and releases that pressure of the aorta, and it goes between the aortic ring and the muscle for the aorta, and it may be forced back into the heart because there is no pressure against it, and is thrown on the heart as its pressure may vary.

Q. Yes. Now, Doctor, what are the signs and symptoms of passive congestion?

A. The signs and symptoms of congestive—passive congestion would be—probably should be defined in two groups. One would be the passive congestion due to left ventricular failure, and the second passive congestion due to right ventricular failure, then I should say have a third one where both valves fail, which is a common one. From the left ventricular failure, we get our stagnated blood, and that really is what passive congestion infers above the diaphragm [308] and in the lungs, and in the lung circulation, first, we would get a congestion of the blood in the lungs, it is as though you would tie a string around your finger and see the veins contract in your finger, and that gradually becomes increased, and then it oozes out of the capillaries so that there is bubbles that get in the bronchi, and if it gets far enough, then we would get froth in

(Testimony of Dr. Homer P. Rush.)

the pleural cavity. Now, from the right side the pressure tends to be down below the diaphragm that we get the same phenomena, it tends usually to go in the liver, which becomes enlarged and the liver is likened to a sponge in which it fills up with blood and therefore it becomes enlarged, and of course all of the tissues in the abdomen and the extremities, the lower extremities will show edema or swelling on the lower extremity, even to the point where we get free fluid in the abdomen. Now, if both the right and left, then we get both of these phenomenon.

Q. Is a frothy liquid which is discharged from the mouth a symptom or sign?

A. As I said, when you get to the place where you have enough in the lungs and it begins to get bubbles in the bronchi, and of course that fluid that oozes out gradually gets mixed up with air, and it makes a white frothing type of material, then of course, when it is coughed up, when a patient has to cough it up, we know the coronaries are bleeding. [309]

Q. What is the significance of this white frothing appearing to get a pinkish tinge?

A. That's when the blood cells are oozing out with the liquid part.

Q. Now, Doctor, what are the signs and symptoms of shock?

A. The signs and symptoms of shock are, I believe—maybe we should divide it, it goes really into

(Testimony of Dr. Homer P. Rush.)

three stages. Shock is a really poorly understood mechanism.

The first thing that happens, is the individual usually feels weak and has a tendency to be cold, gets cold, clammy, or sometimes cyanotic. Circulation becomes impaired. Pulse becomes fast, early, becomes thready as the blood pressure falls and the little veins and little blood cells—it's more than veins—but the little veins is the peripheral circulation, so the blood starts to stagnate in them, but these can't push it on through. The next thing that we get is a fluid that tends to go through these capillary walls so that we have fluid in the spaces around the blood vessels, with this we get less and less blood going back to the heart, and the second stage, I have sort of described the third stage, is where this becomes irreversible and that gets to the place where there is not enough blood that is going back to the heart, so that the heart has any blood to push forward, and we have a condition that would be really forward failure.

Now, in shock, there is apparently a noxious material—— [310]

Q. Just a moment, when you say forward failure, do you mean forward heart failure?

A. Forward heart failure. There is a noxious material that apparently is formed which is a chemical unknown for the most part; we know of two factors of it, one, that it may be made by the kidneys, it may be made by the adrenals, but it may be made by the liver. One of these substances has a

(Testimony of Dr. Homer P. Rush.)

tendency to make blood vessels to constrict, the object being basically to try to get the blood out of there, out in the circulation again. However, the second one that apparently comes from the liver, apparently tends to neutralize that effect as to damage these little arterials and blood vessels so to even neutralize the effect of the secretion from the adrenals which stop, and we get more fluid accumulating in the tissues, we get more dilatation of the peripheral circulation, we get lower amounts that get back to the heart, and we feel that is the so-called irrevocable signs of shock, in which the tissues all over the body and particularly in the vital parts, and these patients usually die.

Q. Doctor, does shock produce signs taken at post-mortems that would be specifically characteristic for these conditions?

A. I don't have none, I don't think there is, because shock has a physiological status. I presume that if one possibly microscopically would check adrenals and check it for normal, that specific term—it might be found in some of the tissue or the like, but I know of no work on it, but there is a lot [311] of work I don't know about shock.

Q. What are the common causes of shock ?

A. Trauma is one of them, particularly a crushing trauma is, where tissue is bruised. Hemorrhage, particularly sudden hemorrhage, certain allergies will give shock like serious infective fevers have been known to give shock; bone injuries. In fact, I think that you could get shock from many things

(Testimony of Dr. Homer P. Rush.)

that would be a sudden change in the physiological mechanism of the body, those are common examples.

Q. Is fright, or other strong emotion a common cause of shock?

A. I think that is one of the definitely accepted more common causes of shock. I think that fright would rank almost up with injury. I know of no statistical studies on that, I am merely giving my impression, but then I am a cardiologist, and I don't see lots of people with injury.

Q. Now, Doctor, what is the largest medical findings with respect to whether a strong emotion, such as fright, may result in sudden death?

A. Well, it is reported by good authority, and I have certainly been familiar with it all during my experiences and practice, that shock or fright or strong emotional tension can be the cause of death. I think that it's fair to say going back 25 centuries you will find such reported information if one will look the literature up. However, any strong emotion can do it. If I can quote a name, Benjamin Rush reported [312] the death of the speaker of the Continental Congress, who died suddenly of supposedly the great joyous emotional tension that he had when he heard that Cornwallis' army had surrendered, and that is a reported death, and that is a recorded case.

Q. Doctor, what is meant by arrhythmia of the heart?

A. Arrhythmia means an irregularity in the beating of the heart.

(Testimony of Dr. Homer P. Rush.)

Q. Is there more than one kind of arhythmia?

A. Yes, these are many kinds of arhythmia.

Q. Are these kinds of arhythmia serious, in that they may endanger the life of the patient?

A. Yes, there are several of these that are important, there are some of them that are very, very serious.

Q. Will you describe the serious arhythmias?

A. All of them?

Q. Well, the ones that involve any threat to the life of the patient?

A. Well, in order to give any discussion of arhythmia, that would have any logic to it, I presume one would have to start back and say that we have, among other of the functions of the heart, that of rhythmisity, and we usually speak of this particular phase of it as the mechanism of the mechanics or mechanisms of the heart beat. Now, normally the heart carries its normal rhythm, which we speak of as a sign of auricular rhythm—didn't we have a diagram of the heart here? [313]

Q. Yes.

A. I think it might be a little easier for people to understand what I am talking about if we had that.

Q. Can you refer to this one, Doctor (indicating)?

A. No.

Q. Will you come over and pick out the one you want? Do you have any objection if we use this for the purpose of illustration?

Mr. Kriesien: I have no objection, your Honor.

(Testimony of Dr. Homer P. Rush.)

The Court: Very well.

Mr. Beebe: It's understood, counsel, that we are limiting it on this as evidence just for the purpose of illustration.

The Witness: If I could mark on the back of that, I could use it.

Mr. Beebe: I had better have this one marked for identification.

The Clerk: Plaintiff's Exhibit 40 for identification.

(Document was thereupon marked Plaintiff's Exhibit 40 for identification.)

Mr. Beebe: Dr. Rush, if you want to use this side of it, I had better mark it now.

The Witness: I don't use that side of it.

Mr. Beebe: If you are going to use it for a chart, we will mark it.

The Witness: It will show up better than all these valves in there, I don't want those at all. [314]

The Clerk: Plaintiff's Exhibit 41 for identification.

(Document was thereupon marked Plaintiff's Exhibit 41 for identification.)

Mr. Beebe: All right. Let's set it here (indicating). Now, Dr. Rush, when you refer to any point on this Plaintiff's Exhibit Nounber 46, don't say "here and there," if you want to point to something here, make an arrow to it and number it, so that the record will be clear, because "here and there,"

(Testimony of Dr. Homer P. Rush.)

means nothing to the record, do you understand, Doctor?

The Witness: I understand, I will try not to point.

Mr. Kriesien: May I approach the exhibit, your Honor?

The Court: Yes.

Mr. Beebe: Do you have a soft pencil that will show up nice and clear?

The Court: I have a red one or a blue one.

Mr. Beebe: What I had in mind, was something your Honor could see up there.

The Witness: I might start out by saying that—is that visible to everybody?

The Court: I can see it fine, Doctor.

The Witness: To start out with, the heart is a muscle and its blood supply comes from the outside. Its nerve supply comes really from the inside, that's demonstrated in this diagram here (indicating).

Q. (By Mr. Beebe): Now, you are referring to Plaintiff's [315] Exhibit Number 46 for identification?

A. Yes, I am going to show it here——

Q. But I want the record to show which one you are using, which exhibit.

A. As shown on Exhibit 46, that——

The Clerk: Exhibit 40.

Mr. Beebe: I am sorry, Exhibit 40.

The Witness: All right. Exhibit 40 has an arrow, one, shows that it goes to it, an example of the coronary veins going to the outside of the heart, and sending its motion to the heart muscle. Heart

(Testimony of Dr. Homer P. Rush.)

muscle is represented by the area that I have marked number two with a circle around it. Now, the nerve supply of the heart follows the liner of the heart or endocardium of the heart, and that is this little area that I have marked with an arrow pointing to it and called it three, and that nerve supply is given here as an example in yellow, that I have put an arrow to and have marked four, and it goes down the lining of the heart, and it sends its fibers to the heart muscle from the inside. Now, if I may have this exhibit—that's going to be 41, I suppose?

Q. Yes, 41.

A. I am going to make an outline of a heart. It won't be as good as the artist's, and show up above with narrow, thin muscle, the auricle and show below the ventricle with [316] thick muscle, and the septum, the right ventricles as thinner muscle than the left, and our valves I am putting in here for identification in red. This is on the right side. This is on the left side, in the heart chambers and our thin septum and the auricle, I will label these the right auricle R.A. and right ventricle R.V. and left ventricle L.V. or for left ventricle and L.A. for left aorta and not auricle, but now the big veins come from the right auricle, as I have shown up here in a place that I will label number one with a circle around and a number two with a circle around—I am putting them for identification. Now, the nerve mechanism that controls the heart beat is the easiest to notice, which is a nerve body which is up

(Testimony of Dr. Homer P. Rush.)

in the junction of the area of where the great veins come in, and I have made it on here as a solid blue line, and put an arrow on it calling it number three. There is no nerve tissue that goes between this node and the second node in the heart, which is at the top of the ventricular septum, and known as the A.V. node and we will call that number four. I don't know why we don't just call these as A., B., C., and D., and this as S.A. This is known as the auricle-ventricular node. Now, there is over from the A.V. node a nerve tissue that goes to the muscle of the heart, as we demonstrated in number 40, and labeled it number four, which I will show here also, and it goes down under the lining of the heart, and then sends its [317] branches out into the heart muscle as a nerve network, that we call Purkinje's and fibers, and after this nerve tissue gets down a short ways to the septum, it divides and we have these two divisions as the bundles, having the left bundle and the right bundle, and it's got these up (indicating). Now, as it goes out to the other side, this whole nervous system is known as the His-Twara.

Q. I just want you to indicate these nerve bundles by a number. Put a number on them on the right or the left?

A. Well, all right. We will just call this one the right bundle.

Q. You have written——

A. And this one the left bundle.

Q. All right, thank you. Doctor.

(Testimony of Dr. Homer P. Rush.)

A. Now, we also have a network of fibers going on across the septum from each of these bundles. Now, coming into both of these nodes from the outside, we have two nerve systems or two groups of nerve fibers, one that comes in from the sympathetic system that I have drawn in blue, and also sends branches down to the A.V. node and we will speak of these as the sympathetic nerve. A second one which comes in a branch of the vagus or the parasympathetic nerve, it is sometimes called, and we will speak of it as the parasympathetic.

Q. You have indicated both of those in red?

A. I have indicated the parasympathetic in red and the [318] sympathetic nerve in blue, that go to these two nodes.

Now, if we get strong stimulation over the sympathetic nerve, it will make the heart go fast. If we get strong stimulation over the parasympathetic nerve, it will make the heart go slow, so that we have a balance in the normal heart beat by how much stimulation we may be getting from these two nerves in the normal individual. Now, these nerves are not necessary to control the heart completely, they are merely accessory nerves, because the heart is an automatic action, and will do it by itself, but these nerves will influence the heart as regards its beat, when the heart does not have other things that make it work. Now, the reason I make that statement, is because a working heart will ignore its nerve impulses.

(Testimony of Dr. Homer P. Rush.)

The Court: What did you say?

The Witness: A working heart, that is that heart that is going fast, that is working hard will not accept the impulses from the vagus to go slow until after it is quieted down and rested. Now, the impulses that start the heart beat, start in the S.A. node and it goes over the surface of the heart, which we might say, as dropping a pellet in water, we make a wave, it comes out from this node and goes across over the auricle, and when that reaches the A.V. node, it is now conducted about this system into the ventricle. In a regular order. The electrocardiogram measures this activity [319] that goes on through the electrical play in the heart muscle and really is not a measure of the heart beat. It occurs from the heart beat. Now, if we start here, which is the normal place, then we have a normal heart rhythm and if we get a lot of sympathetic impulses it goes faster, and we speak of it as a tachycardia, of an auricular tachycardia. All right, if we get a lot of impulses from the parasympathetic, it goes slower, and if in breathing, as we do, we can have influences that come in over the vagus or on the respiratory phase, and that will make the heart go slow, and then it will speed up and go slow, and that is arhythmia, it is called respiratory arhythmia. If we had some part—if the auricle out here (indicating) becomes irritable, then the node, such as I have marked here with an X, 1-X, we'll call it, that initiates a heart rhythm, and it comes from some place and has to go faster than

(Testimony of Dr. Homer P. Rush.)

is normal, and that would be an auricular tachycardia. It can come from any place, of course, in the auricle. If it is down here in the ventricle, that I have marked 2-X, then we'd have a ventricular tachycardia. Both of these are regular, we also can have it start in this node here (indicating). In the S.V. node, which we speak of as a node, but it can go fast or slow. Now, if the auricle becomes more irritated for any reason, mechanical reason, nervous or what have you, then we tend to develop rapid impulses that go around through the [320] auricle and it will make the rate go up about 300, and we call that an auricular flutter. That's regular, that's the first one of these—that's one that could be serious. I should have stated the ventricular tachycardia can be serious if that goes still faster, and it's not a regular course, but an irregular course that it follows through it, and we have an auricular fibrillation, we can have the same thing that goes on in the ventricles, and if it follows the regular course, the heart will go faster, and we will have it going about 260 to 300 before we get the flutter, then we have a ventricular flutter, and if it goes still faster than that, then we have ventricular fibrillation. Now, when we have a very, very fast heart rate, it is obvious there is not enough blood to get into the heart to pump the head of blood out to the main circulation for normal activity, but when we get fibrillation in the auricle, the auricle trembles, it don't force blood in the ventricle, but it acts more as a reservoir and the ventricles pump and blood can

(Testimony of Dr. Homer P. Rush.)

go out in the body, and then we can have auricle fibrillation for years. There is some dangerous clots that form inside here, and if they can push a clot out, but if that happens to the ventricle, which is really the pump, the auricle—or the auricle that receives the blood or the pump, but, now, if we have a fast mechanism at the ventricle or this irregular type of beating—that is not a beat—or a quiver in the muscle, those are [321] carried out as though the ventricle is at a standstill, and that is—with a ventricular fibrillation, that would be a serious one. Now, one more and I'll—we can also have blocks in these impulses so that the impulses cannot get through this nerve system of the heart like it should, and that can produce standstills in the ventricles, where it just stands there, there is no vibration, there is no movement of any kind, and clinically or physiologically speaking, that would be the same thing as a ventricular fibrillation, and if the two of them did it, if it would happen in the same place neither one of them would put any blood out, but this is a different mechanism that initiates it. I think that takes up the general run, if I made it halfway clear.

The Court: I think we will take a recess. Now, it's almost twelve. Will two o'clock be all right?

Mr. Kriesien: Yes, sir.

Mr. Beebe: Before we take a recess, may I offer these 40 and 41 for the purpose of clarity and to illustrate the doctor's testimony?

(Testimony of Dr. Homer P. Rush.)

Mr. Kriesien: No objection to it on the basis of illustration.

The Court: It will be received.

(Documents previously marked Plaintiff's Exhibits 40 and 41 for identification [322] were thereupon received.)

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.)

(Pursuant to recess, proceedings were resumed at 2:00 o'clock p.m., November 28, 1956.)

The Court: You may proceed, Mr. Beebe.

Q. (By Mr. Beebe): Doctor, before the adjournment for lunch, we were discussing the serious arrhythmias. Are any of those incompatible with life?

A. Yes.

Q. Which one?

A. The one that would stop the heart. Ventricular fibrillation is also incompatible with life if it lasts long enough. Ventricular flutter would not be compatible with life, although I think it would be fair to say that there would be more chance to recover from it, but if it would last too long, it would be an ineffective rhythm, and ventricular tachycardia if it were fast enough would not necessarily be incompatible with life. That doesn't change it over to one of the other irregular rhythms which it is very apt to do, and if the rate were not fast enough to require the individual—for life, I have seen ventricular tachycardia go for 32 days

(Testimony of Dr. Homer P. Rush.)

and the patient still recover. Auricular fibrillation which is an irregular rate, now, you have the ventricle working [323] and the danger with auricular fibrillation is the damage to the ventricle because of the fastness of the beat or the damage of casting off a clot that is formed inside the heart when it doesn't have a full beat, and of course, that clot could form in some other part of the body and produce sudden death.

Q. Now, Doctor, when you say that ventricular tachycardia isn't necessarily incompatible with life, unless it changes over to one of the other arhythmias, which arhythmias are you speaking of?

A. Ventricular flutter or ventricular fibrillation.

Q. Now, what are the signs and symptoms of ventricular tachycardia?

A. Usually, ventricular tachycardia starts suddenly and has a very fast rate, so that you'd have a very fast pulse in there, some place around 220 would be a common one, and the blood pressure may hold about the same unless it gets to going fast enough, and then the blood pressure would tend to fall. A person would have a sensation of anxiety, sense of insecurity usually in their chest, as though something isn't right. They may not have pain if it is long enough, and fast enough, they will have pain out of the fatigue mechanism, and the deficient coronary flow, and then again it depends upon how much strain it puts upon the heart muscle, and gradually the heart muscle becomes more and more fast, and it becomes [324]

(Testimony of Dr. Homer P. Rush.)

less and less effective, and we get these symptoms as described due to passive congestion. If it's of short duration, and I mean about—I mean by that a matter of seconds to minutes usually they only notice the palpitation, signs of anxiety, possibly a little disturbance or feeling in the chest that something isn't right, and usually some nervousness or anxiety or fear and sometimes they will show a fast pulse.

Q. Now, Doctor, what are the symptoms and signs of ventricular flutter?

A. I think you'd almost have to discuss ventricular flutter and ventricular fibrillation together, because they tend to be so closely associated, and neither of them are compatible with life with having the ventricle beat sufficient enough to carry on normal circulation, and so we think of both of them as really causing almost the same physiological phenomenon as a ventricular standstill. It is the activity of the muscle, it is more than a quiver and not a beat, therefore the blood is not circulated, so that one gets first a sensation of weakness, maybe some dizziness, and in a matter of three to five seconds they usually will get a distinct pallor or cyanosis with tendency toward cold, clammy pallor is the most common, but they can become reddish and then if it goes on longer, about ten seconds, we begin to get unconsciousness. It may come on sort of as a spell, I mean by that, a little [325] fade-off, and then maybe not quite complete at the end of about 20 seconds they will usually become unconscious, and

(Testimony of Dr. Homer P. Rush.)

during this time the pulse disappears, blood pressure disappears and the patient will begin to develop shortness of breath. Now, if this is all there is to it, usually by this time we will have stertorous breathing, and we will have cerebral anoxia and the patient will take a few gasps and the patient dies from cerebral anoxia. If an individual has had reasonable circulation before, and possibly there has been some possibility of blood flow—but still, there must be some, because they can go on up to approximately eight minutes, after which I don't believe there has been any known recoveries. Some of them will develop convulsions when they go on into that stage, they will develop evidence of oozing in a matter of about 20 seconds—I mean by that where the fluid part of the blood, it again begins to leak throughout the capillaries and so forth.

Q. Doctor, how soon after the commencement of ventricular flutter or fibrillation or heart stop asystole does the stertorous breathing commence?

A. That would depend a little bit upon rapidity. When you say flutter, fibrillation, you have got to remember what is meant by that, and the graduation between ventricular flutter and ventricular fibrillation, and if it is ventricular fibrillation, if it is a pure fibrillation and nothing else, probably death would occur in approximately less than a minute [326] and a half. Stertorous breathing would probably come on in less than 20 seconds. There is some ventricular tachycardia, that is, some part of the time there is an occasional breath, and you are

(Testimony of Dr. Homer P. Rush.)

getting some blood there, and a slow rate and slow output, that would go on probably up to as high as ten minutes. Now, the longest that I have ever seen it in a patient has been approximately eight. It's frequently reported that asystole or a lack of any blood flow—there never has been a recovery in over eight minutes. Now, I have never seen anybody go that long and have a recovery.

Q. Doctor, I will hand you Exhibits Number 16 and 20 in evidence and ask you if you have examined those? Those are the electrocardiograms of Mr. Lyons, one of them dated 1950, and one of them February, 1953.

A. I have examined both of them.

Q. Do they show any evidence of any heart abnormality?

A. In my opinion, no. The one that was taken in 1950, there is a technical error, obviously mixed up the left and right arm leads which reverses the polarity of the electrode, so it is negative, and in lead one and lead two and lead three become reversed, which seems obvious here, but assuming that to be correct, this would be a normal electrocardiogram.

Q. They had the machines mixed up?

A. Yes, they had the electrodes for the left and right arm reversed. The one taken on February, '53, is a perfectly [327] normal electrocardiogram, I would think, it shows no abnormality of any significance.

(Testimony of Dr. Homer P. Rush.)

The Court: Of course, those electrocardiograms are by no means foolproof, are they, Doctor?

The Witness: They know the electrocardiogram as one of the instruments with which to help them in their diagnosis. It is an instrument to aid us in diagnosing. This is not a diagnosis, but there is some part in it that is very, very helpful.

The Court: No, I have in mind, I have heard of people who had electrocardiograms and come out perfectly normal and the next day they dropped dead.

The Witness: Your Honor I have seen people in which electrocardiograms was taken that was normal and they dropped dead within ten minutes after it was finished. An electrocardiogram by itself is not the whole answer.

The Court: May I see that?

(Document handed to the Court.)

The Witness: It will be noted in that first electrode, they had a lot of A.C. difficulty, of course that is purely a technical thing, here it's 60 cycles.

Q. (By Mr. Beebe): Now while the Court is examining those, as a matter of statistics can you tell us what the percentage of heart abnormalities will be ordinarily disclosed by an electrocardiogram? [328]

A. Well, when you use the words heart abnormalities, it makes it a little difficult for me to know just what you mean. For instance, the electrocardiogram will discover all arrhythmias; ectopic beats, or

(Testimony of Dr. Homer P. Rush.)

beats of other than normal origin, as I say, the heart may not have the proper functions and things of that kind, and of course it is very accurate, but those are not all serious heart conditions, and people with normal hearts as regards functions may show ectopic beats which electrocardiograms will show, but it would be a harmful heart, but it would not be a normal heart, the electrocardiograms will not show anything about valve lesions per se. It will only show the indirect effect. Electrocardiograms do show us in a high percentage of cases, now, of evidences of coronary circulation, provided the individual has been under an adequate strain before the electrocardiogram is given, which has improved our knowledge on it, considerably.

Q. Will an electrocardiogram show a significant enlargement of the heart, for example?

A. An electrocardiogram will show evidence of ventricular hypertrophy or evidence of the position of the heart or the rotation of the heart, but one then has to realize that you must know what hypertrophy means. In other words, it does not per se tell you that your heart is enlarged due to this. It doesn't measure the ventricular hypertrophy to begin with, the electrocardiogram, you know, does not measure the heart [329] beat, it measures the wave of excitation that goes over the heart muscle that precedes the beat. After a man is dead, you can get evidence of ventricular fibrillation waves going over that heart for 10 or 15 minutes and the heart not

(Testimony of Dr. Homer P. Rush.)

moving. That can be done experimentally and has been done many times.

Q. Now, Doctor, have you examined the translation of the medical report of the autopsy that was translated by Dr. Christen?

A. I examined most of it, I did not quite get to finish it during my lunch hour.

Q. Would you finish reading it, Doctor, please? You were familiar with the prior translation; were you not, Dr. Rush?

A. Yes, I believe I am.

(Document handed to witness.)

Q. Dr. Rush, you notice that the autopsy states as a conclusion, that the primary cause of death is an acute aortic insufficiency. I will ask you if, in your opinion, there are any medical facts or evidences which are reported in the autopsy, which in your opinion justify the conclusion of acute aortic insufficiency?

A. No, it would not. My opinion is that there is not a description of the aortical that would justify a conclusion of aortic insufficiency.

Q. Now, Doctor, what would an autopsy reveal, or what in [330] your opinion would an autopsy have to reveal to justify the diagnosis of coronary insufficiency?

Mr. Mize: If the Court please, I object to the question as calling for the opinion of this witness as to what somebody else would or would not put in an autopsy.

The Court: I don't think the question is that, as

(Testimony of Dr. Homer P. Rush.)

I understand your question is, what would the autopsy have to reveal?

Mr. Mize: All right, thank you.

Mr. Beebe: Yes, in order to justify diagnosis of acute coronary insufficiency.

The Witness: I would expect an autopsy to state that the aortic valve——

Mr. Mize: If the Court please, I move that the question and answer be stricken on the grounds that he would expect the autopsy to state.

The Court: Well, the question is, what would an autopsy have to show in order to confirm the diagnosis, is what counsel is asking you, is that right?

Mr. Beebe: Yes, your Honor.

The Witness: I believe that an autopsy should show that the aortic valve should have evidence that they could not or did not close. If I could have a piece of paper, I could probably make myself clearer.

Mr. Mize: I think that's clear enough, your Honor. [331]

Mr. Beebe: Doctor Rush, did you want to make a diagram to show——

The Witness: I was thinking maybe I could make it clearer if I could diagram it, what aortic insufficiency is, what changes you would look for in a valve, and what they might show in a diagram on that, so that you would know what my terms meant that I was using, because I have found out this, sometimes my terms are not as clear as I think they are to other individuals. I think we could put

(Testimony of Dr. Homer P. Rush.)

them right on the bottom of this (indicating) if nobody would object.

Mr. Beebe: In order for the Court to see them from where you are going to be, Doctor, we should probably make a new one.

The Witness: Well, just put it down here (indicating).

Q. (By Mr. Beebe): Can you make them big enough so the Court can see them?

A. I think so. If we would take and look down from above on the valve—in other words, as though one were just going to let my fist represent it and my finger represent the ventricle, and where the aorta goes out up here (indicating) where my finger is representing, we are going to cut it across so we can look down on it, and we would get a round area where this goes out, and the semilunar valves are three, so that looking down on it, we would see some such picture. This would be the ring about the valve, and I am going to [332] put an opening here—well, we can't do that—skip that. Now, these valves are really little cusps so that we could put in this type of a protraction and so we would find that these are little cusps that look like this (indicating); they are fastened to the edge here (indicating) around the edge of the aorta and there are three in the center. When the heart pushes the blood up as the aorta shows, that forces these valves up in this position, and the blood can freely flow out, when the force below—because the heart now relaxes—disappears secondarily, we will get a back pressure

(Testimony of Dr. Homer P. Rush.)

from above and I will mark aorta—A or two over more on this side diagram, and that catches in these cusps and brings the valve closed. And when we look at it from above, it looks as they are now. The insufficiency means that this valve cannot close due to some reason, therefore you would expect to see either this valve deformed so that we would have a valve that would be scored or crinkly, retracted, have nodules on it, and leave some kind of a hole that cannot be filled in so that it doesn't come together, so that there is a hole in here or that the edges of the valve do not come together, so that we would have the valve that would close in this approximation, leaving gaps in between, because this had widened out too much or some disease produced, had pulled it apart too much. Now, the description pathologically used, of course, describes these things from the description used [333] in this pathology stated that this valve was stiffened and hardened. Now, that merely would mean that it's stiff, and normally if it's retracted, that is it's pulled, that is it's open, the cusps are pulled apart, that ring is stretched in order to pull the cusps apart. There is no statement made that would indicate that, but was there complete closure of the valve. It merely says stiffened and hardened by plaques, but I would think that there might have been atheromatous deposits or plaques along here, and along the vessel, but I couldn't take that to mean that it had pulled that valve or deformed that valve, and I think any

(Testimony of Dr. Homer P. Rush.)

pathologist would have certainly in one terminology or another, if he saw a deformity to the valve.

Mr. Kriesien: I move to strike that portion of the witness' testimony concerning his opinion as to what this Mexican autopsy revealed or should have revealed for him to arrive at an opinion that this condition of the valve did not exist.

The Witness: I don't think I made myself clear——

Mr. Kriesien: And the question that was asked him was what would you expect to find on an autopsy to have an aortic valvular insufficiency, and not his opinion as to whether this particular autopsy report is sufficient to indicate such a condition.

The Court: Well, I am going to sustain that objection.

Q. (By Mr. Beebe): Now, Dr. Rush, would you please step [334] down and number these diagrams that you have made?

A. We will call this first one number four in a circle; five with a circle; six with a circle; and seven with a circle; and eight with a circle.

Q. Now, Dr. Rush, referring to the diagrams, and particularly figure number five, what kind of a situation does that show; I mean, is that a rheumatic heart or syphilitic heart?

A. No, sir. That's the type you would expect for endocarditis or in a rheumatic heart, or bacterial endocarditis.

Q. And number six?

(Testimony of Dr. Homer P. Rush.)

A. More the type you'd describe, or find in a syphilitic or rheumatic heart.

Q. Now, number four?

A. That was a normal—corresponding to a normal valve.

Q. Number eight?

A. Is the impression I would get a valve would look like that was supposed to be hardened and stiffened with atheromatic deposits, plaques on it.

Q. And number seven?

A. Another projection of how the valve works, the valve is being closed as related by position A with a circle around it, and B with a circle around it shows the valve opened.

Mr. Maguire: Your Honor ruled on that question. I merely wanted to suggest this, that conclusion must be based upon fact, if the findings are not sufficient to justify the conclusion, I think it's within the realm of propriety that an [335] expert may look at the findings made and express an opinion as to whether or not the findings support the conclusions.

The Court: I have no quarrel with that.

Mr. Beebe: No, the thing that went out, Bob, as I understand it was simply his reference to the Mexican autopsy in this, as not being responsive or proper. He had already answered the other question specifically about it; all that went out was his reference to what the Mexican autopsy found—

Mr. Maguire: If the conclusion has been sustained, I think we understand each other.

(Testimony of Dr. Homer P. Rush.)

The Witness: I think I misunderstood it, the way I stated—it was the way I used my language.

Mr. Mize: I move that be stricken from the record, your Honor, as not responsive to any question.

The Court: It is simply a voluntary statement. I am not going to regard it.

Q. (By Mr. Beebe): Now then, Doctor, have you studied the medical records which are in evidence, marked Exhibits 18 and 19?

A. I don't believe I know them by number.

Q. May I have the translation of the interrogation—Exhibit 14?

A. I have seen both of these reports, but I have not gone over them recently, and I am not familiar with what is in them. [336]

Q. Will you examine them, Doctor?

A. Yes, sir.

Q. Have you looked at both those exhibits?

A. I have looked at both of these, yes, sir.

Q. Now, Dr. Rush, for the moment I am going to ask you to assume certain things, ask you to assume the facts as shown by those, but before that, I am going to ask you about atheromatous plaques and ask you what those are?

A. Atheromatous plaques are little plaques that are under the lining of the blood vessels that are fat-like substance and have deposits of some of the electrolytes gradually replaced in them as time goes on, and calcium is finally deposited. Usually, when we speak of them, they are more or less yellowish

(Testimony of Dr. Homer P. Rush.)

linear to a small plaque-like character that are not very thick, slightly thickened, and of course can gradually increase. As they become more and more pronounced—there is one diagram that was here that shows them quite well.

Q. Now, Doctor, in your experience, is the finding of atheromatic deposits of the coronary arteries or deposits upon the aortic valve, is that an unusual or uncommon finding in men 49 or 50 years old?

A. I couldn't say—I am a clinician, not a pathologist, I have seen autopsies—it's been since 1926 since I did my last autopsy myself, I believe, and I have seen many of [337] those valves, but I would not, from my own personal observations know any particular statistical information. My feeling would be that it's not particularly uncommon.

Q. Well, Doctor, what is the state of medical science on that; is it usual or common to find some atheromatic deposits in a man of 49?

Mr. Kriesien: If the Court please, I will object to that question. This witness is testifying as an expert who is not familiar with the facts in it of medical science.

The Court: Objection sustained.

Mr. Kriesien: And I also request the response to the question be struck on the ground that the witness stated, he testified that he did not know of his own knowledge.

The Court: It may go out.

Q. (By Mr. Beebe): All right. Now, Dr. Rush, I want you to assume the following facts: Assume

(Testimony of Dr. Homer P. Rush.)

that Mr. Lyons was 49 years of age; a very active, dynamic, energetic business executive, who put a great deal of himself into everything he did in connection with his lumber operation, in which he went to the timber and conducted the inspection of it, the supervision of his operations; he operated a ranch where he raised black Angus cattle, and was interested in and participated in hunting and fishing; in the 1940's, that exact time being unknown, Dr. Raymond McKeown, a physician and surgeon of Coos Bay, Oregon, examined Mr. Lyons for a [338] life insurance policy and found no evidence of heart disease; in 1950, Mr. Lyons was walking across a dock or deck and suffered pain in his chest which was of a constrictive nature, radiating in through the arms, and he stated that he was unable to hold a telephone; Dr. McKeown did a heart examination and found no signs of any abnormality; in the examination, executed an electrocardiogram which was within normal limits and which you have seen, Exhibit Number 17 in evidence, and exercise tolerance tests wherein the heart was inspected before and after exercise, and no murmurs were noted; in 1950, Mr. Lyons suffered rib fractures and facial injuries in an automobile accident, he was treated by Dr. McKeown and he flew, after that, to Palm Springs and suffered a hemothorax, and later developed gout, for which he was treated by Dr. McBride, a surgeon who specialized in internal medicine in Palm Springs, California; Dr. McBride gave Mr.

(Testimony of Dr. Homer P. Rush.)

Lyons a thorough examination during 1950; a physical examination in the spring and fall of 1951 and in the fall and spring of 1952. Mr. Lyons never reported any symptoms of chest pain to Dr. McBride before an examination of February 4, 1953, nor did he ever mention gall bladder symptoms. There is no evidence in these examinations of high blood pressure, and the electrocardiograms taken on these examinations did not vary from the electrocardiograms taken later on February 4, 1953, and which you have seen, being Exhibit Number 20 in evidence; on [339] February 3, 1953, on the evening of the day Mr. Lyons returned from the extensive business trip, he complained of fatigue and went to bed, and that night had chest pains of a constrictive nature with radiation to the arms; on the following morning February 4, 1953, Mr. Lyons complained to Dr. McBride of constrictive chest pains radiating down the arms; giving a history of just having returned from a very extensive business trip which had involved a purchase of a ship, and which was a matter of importance to him; and Dr. McBride gave a cardiac examination and fluoroscopic examination, exercise tolerance tests, electrocardiograms, blood count and sedimentation rates with no objective physical symptoms of any cardiac conditions; Dr. McBride advised rest and relaxation; advised Mr. Lyons to go on the contemplated fishing trip; that he refrain from tramping through the fields or doing heavy labor or excessive work;

(Testimony of Dr. Homer P. Rush.)

gave a prescription for nitroglycerin, which he advised Mr. Lyons was to be taken in the event that he needed them; also, Doctor, assume the facts found by the Mexican autopsy and disregarding any professional opinions therein, consider and assume also the truth of your own testimony, and the conditions of your observations of Mr. Lyons, and the description of his death, and all the factual matters that you have testified to when you were previously on the stand; consider also all of the facts which appear from the history of Mr. Lyons and his [340] medical record as it appears in Exhibits 18 and 19, which you have just read; now, Doctor, making those assumptions and no others and disregarding any medical opinions of others that you may have heard sitting here in the courtroom, I am going to ask you a series of questions: First, do you have an opinion as to the condition of Mr. Lyons' heart prior to the fatal incident on February 10, 1953?

Mr. Kriesien: If the Court please, I object to the question on the ground and for the reason that it does not properly state the facts as revealed in the Mexican autopsy report. The question does not incorporate the facts of the occurrence. It erroneously states that there had been no complaints of this pain, constricting of the chest and radiation down the arms since 1953, and requests this medical expert to base an opinion upon findings of other doctors which is incorporated in their opinion as to the result of the examination.

The Court: Well, I think you specifically ruled

(Testimony of Dr. Homer P. Rush.)

that out in your question, you told him not to regard the opinions of anyone else, and the question is whether he personally has any opinion based upon his knowledge of the man's condition. I think that is a proper question.

Mr. Mize: May I supplement the statement, your Honor, in the hypothetical question it mentions the finding of Dr. McKeown, which was his opinion that there was nothing found [341] in the man at that time, and not in the hypothetical question, it has reference to the examination by Dr. McBride, and the two opinions, the one of Dr. McKeown and the one of Dr. McBride. Now, it is my position that that is certainly an opinion on an opinion and it doesn't state the clinical facts.

The Court: I am going to overrule that objection.

Q. (By Mr. Beebe): Now, do you recall the question? A. I think I do.

Q. Let the reporter read it. Read the hypothetical question, please.

The Witness: I know the question.

Q. (By Mr. Beebe): Well, all right. Do you have an opinion as to the condition of Mr. Lyons' heart prior to the fatal incident on February 10, 1953? A. I do.

Q. What is that opinion?

A. I felt that he had a normal heart.

Q. Now, by a "normal" do you mean a normal one for his age?

(Testimony of Dr. Homer P. Rush.)

A. I mean an average, normal heart for an individual 49 years of age.

Q. Do you have a medical—making the same assumption and no others, not including any opinion of anyone else, and the same assumption that I gave you; do you have a medical opinion as to whether prior to the fatal incident, Mr. Lyons was afflicted with any conditions by which his bodily health [342] was seriously attacked, deranged, or impaired or an alteration of his body or some of its parts to the extent that there was a disturbance or interruption affecting the vital function? A. I do.

Mr. Kriesien: If the Court please, I object to the question on the grounds heretofore stated, and that this individual has testified that his practice has been limited to clinical findings and must necessarily totally disregard the autopsy findings in arriving at a conclusion.

The Court: Overruled.

Q. (By Mr. Beebe): Do you have an opinion, Doctor? A. I do.

Q. What is that opinion?

A. Will you state your—I don't—

Q. All right. Do you have a medical opinion as to whether, prior to the fatal incident, Mr. Lyons was afflicted with any conditions by which his bodily health was seriously attacked, deranged, or impaired, or an alteration of his body or some of its parts to the extent that there was a disturbance or interruption affecting the vital function?

A. I do have an opinion.

(Testimony of Dr. Homer P. Rush.)

Q. And what is your opinion?

A. My opinion is that he had a perfectly normal acting heart for a man of his age. I could not see—or can see for no reason—or with the information I now have, any reason to [343] assume that he wasn't perfectly normal and healthy for a man of 50 years of age.

Q. Now, Doctor, when you say “what you know now”——

A. From what I have gotten from the records and from the Mexican autopsy report and from the electrocardiograms and from those two records that I was allowed to read.

Q. You mean—— A. Exhibit——

Q. 18 and 19? A. Yes.

Q. And is it based also upon the hypothetical question that I gave you concerning his history?

A. It is.

The Court: How well did you know Mr. Lyons, Doctor?

The Witness: I had never seen Mr. Lyons previous to the Saturday before his death.

Q. (By Mr. Beebe): You had just been invited to go on the hunting trip and met him for the first time?

A. Yes, I met him down in Los Angeles, the first time I saw Mr. Lyons.

Q. Now, making the same assumptions, Doctor, and no others, do you have a medical opinion as to the cause of Mr. Lyons' death on February 10, 1953?

A. I do.

(Testimony of Dr. Homer P. Rush.)

Mr. Kriesien: If the Court please, same objection on [344] the ground that the hypothetical question does not incorporate all the facts, and the testimony of this witness in his direct examination, and that it's apparent that he cannot have an opinion on this subject.

The Court: Overruled.

The Witness: I do have an opinion.

Q. (By Mr. Beebe): Your Honor, I overlooked giving the witness one thing, and I should like to give him that information now and ask him if his prior answers would have been the same. And I refer to counsel's exhibit of Dr. Serrano down south. I will put that in.

Mr. Kriesien: If the Court please, the document was handed to the witness. He has examined all of them.

Mr. Beebe: No, it hasn't been handed to him, counsel, and we all have a lot of things to do, and it is an error of mine, and I want the witness to have everything before him. Now, Mr. Kriesien went down to Mexico and examined—asked Dr. Serrano, the man who made the autopsy—some questions and he made some answers. I might explain to amplify the physical findings of the autopsy, and I'd like to have you read that, Doctor.

Mr. Kriesien: May I suggest that you give it to the doctor to read?

Mr. Beebe: Well, I was going to do that; I will hand it to the doctor. May it be stipulated, Mr. Kriesien, where it [345] says "gall bladder was filled

(Testimony of Dr. Homer P. Rush.)

with black fluid, and also there were found two gall stones one of one centimeter in diameter lodged in the junction of the cystic canal and the coledoco," that means the common bile duct?

Mr. Kriesien: So stipulated—now, just a moment. Now, what was our translation——

Mr. Beebe: Your translation——

Mr. Kriesien: Not mine, he said common bile duct, is that right?

The Court: That is my recollection of what he said.

Mr. Beebe: In other words, this one here says "coledoco" and if I recall the testimony of Dr. Christen, he said——

The Court: Didn't he call it a biliary duct?

Mr. Beebe: Yes, common biliary duct.

Mr. Kriesien: I will stipulate as to what he said.

Mr. Mize: Just a minute, I'd like to find out what Dr. Christen said, there is a definite discrepancy in what he said and what the translation was, and I believe it's rather important.

The Court: All right, let's find out where the discrepancy lies.

Mr. Beebe: Wherein do you claim the discrepancy is, I thought that that was also your translation, said that it was the cystic duct and the common duct?

Mr. Mize: Well, we are talking about some terms that [346] I am not familiar with, and I want to be sure we are right before we stipulate, that's all.

Mr. Kriesien: My recollection of the doctor's

(Testimony of Dr. Homer P. Rush.)

testimony is that the word "coledoco" meant common bile duct.

Mr. Beebe: That is my recollection. So it is stipulated then, that where the word "coledoco" appears, that means the common bile duct?

Mr. Kriesien: Correct.

Mr. Beebe: Doctor, will you examine the translation of Exhibit 14?

(Document handed to witness.)

The Court: We might take our afternoon recess now, while the doctor is going over it.

Mr. Beebe: Yes, your Honor, thank you.

Mr. Kriesien: Yes, your Honor.

(Whereupon, a short recess was had.)

The Court: May I inquire, gentlemen, how much longer we will be in the case, in the trial of this case?

Mr. Beebe: Your Honor, this will be, I believe, our last witness unless something unusual occurs, and there is one matter that we will reach a stipulation on, and that is in the event that plaintiff does prevail, attorney's fees are allowed under Oregon law as we understand it, the Court may fix those with or without evidence, and the usual stipulation is entered into. If the plaintiff prevails the [347] Court may fix that thereafter, fix that after it determines the primary issue in the case, either with or without testimony as to the work that was

(Testimony of Dr. Homer P. Rush.)

done, and I understand that such will be the stipulation.

Mr. Kriesien: That is correct.

Mr. Beebe: So that this will be our last witness, your Honor.

Mr. Kriesien: And we will have, I believe, three witnesses, your Honor.

The Court: Medical men?

Mr. Kriesien: Medical men, also.

The Court: Well obviously then, I am just trying to—I think I have a jury case to try Wednesday—is it Wednesday, Mr. Clerk? Do you think we could finish it tomorrow, possibly?

Mr. Kriesien: I don't know, your Honor. I'd hate to make such a representation, I think the cross-examination of Dr. Rush will be quite extensive.

The Court: All right, we will try to go right ahead with it.

Mr. Kriesien: We will try to expedite it.

Q. (By Mr. Beebe): Dr. Rush, you have examined the transcript of the questioning of Dr. Serrano by Mr. Kriesien? A. I did.

Q. I wish you to assume the answers given there in addition [348] to the other matter I have given you, to assume in this hypothetical question.

A. Did you ask me a question?

Q. No, I am asking you to assume that as well as the medical record and the hypothetical question I have given you. The question now is, after having considered this latest matter of Exhibit 14, would

(Testimony of Dr. Homer P. Rush.)

that change any answers you have given to the questions? A. No, it would not.

Q. Now, to return to the question I have asked you, based upon the hypothetical question; the medical record; your own testimony concerning the occurrence after you met Mr. Lyons up to and including his death; and so forth, all of those, do you have a medical opinion as to the cause of Mr. Lyons' death? A. I do.

Mr. Kriesien: We object on the grounds as heretofore stated.

The Court: Same ruling.

Q. (By Mr. Beebe): What is that opinion?

A. I think his death was due to the explosion of a shotgun.

Q. Now, will you explain your answer, including the physiology of Mr. Lyons' death and incidentally, Doctor, I might say that any of the charts that are in evidence or which we have over here, which you feel that you should use to make [349] your answer more clear, feel free to ask for them and use them.

A. Well, my conclusions are based upon the following chain of events. Now, first, from what I have been able to learn, and what I saw, I felt that Mr. Lyons was in normal health for a man of his age. I didn't say perfect health, I said normal health. He certainly showed no evidence of any limitations in activity that would incriminate the cardiovascular system. Nor have I heard anything that would change that opinion. He had an explosion

(Testimony of Dr. Homer P. Rush.)

of a shotgun which went off apparently close to the right side of his head, following which he went into some type of heart failure and died. It's my opinion that it was the chain of events as follows: First, the explosion of the shotgun produced reflex phenomena that affected the circulatory system and shock which comes from nervous impulses affecting the circulatory system that produced a change in rhythm in his heart, so that it undoubtedly would not be carrying on efficient circulation, but some circulation for a period of time, because he didn't die in a minute or a minute and a half, as I would have expected if it had been only ventricular fibrillation, but he did show the early marks of having developed passive congestion, which meant that he must have had a heart that was trying to work for some period of time. This gradually became more marked. His heart was unable to compensate [350] for the factors of shock, I believe come into the picture, irreversible shock, and he eventually developed a full ventricular fibrillation which of course produced death, because of cerebral anoxia which is true in any type—such type of death. I think the chain of events which was the primary cause produced shock and the heart failure. Both may come on together, which is followed by no efficient circulation, which would allow for some true heart failure or passive congestion which was undoubtedly aggravated and made an irreversible shock, and at the same time a complete arrhythmia ventricular fibrillation, probably, although nobody

(Testimony of Dr. Homer P. Rush.)

can tell. There was no electrocardiogram, but certainly he had a rhythm that was not capable of efficient cerebral circulation to sustain life, because of cerebral anoxia.

Q. Doctor, in connection with the shock and the lack of circulation, would you go into that a little more fully? It may be that you want to use those charts there that Dr. Chamberlain used the other day?

A. I don't——

Mr. Mize: May I ask a question? Is he continuing his answer?

Mr. Beebe: I am asking him to explain more in detail the effect of the shock and his circulatory disturbances from it.

Mr. Mize: He is through with his reasons for finding [351] such was the cause of death?

The Witness: No, I——

Mr. Mize: Because I want to interpose an objection.

Mr. Beebe: Oh, had you finished answering the question that I asked you?

The Witness: No, I merely got up and gave the chain of events that I thought occurred.

Mr. Mize: Then, I would ask, your Honor, that the answer of this witness be stricken from the record on the ground and for the reasons that we previously stated to the hypothetical question, and further on the grounds of the fact that the doctor is assuming certain facts to be, which are not in evidence; namely, for one, when the shotgun went off. We also have not been apprised as to what his

(Testimony of Dr. Homer P. Rush.)

findings were. There have been no facts, counsel has merely asked him from his knowledge and from what he observed. There is no evidence as to what he observed at the time, and I move that the answer be stricken.

The Court: Motion is granted.

Q. (By Mr. Beebe): All right. Doctor, will you please resume the stand, please? Would you give—now, let's see, that which was stricken, your Honor, does that relate only to the explanation which he has given? A. Yes, I think——

The Court: Yes, I think so, particularly with reference [352] to the discharge of the shotgun, because we have no means of knowing how the shotgun was discharged.

Q. (By Mr. Beebe): Doctor, do you now assume in your answer that the shotgun was discharged first, and commence with the next thing in the order, and then explain the reasons for your opinion that the explosion of the shotgun was the cause of his death.

Mr. Kriesien: If the Court please, I will object to his making an explanation in his opinion why the explosion came first, and not the heart failure came first, because it is contradictory, and you have asked him to explain the reason why in his opinion the explosion preceded it.

Mr. Beebe: No, he has testified, your Honor, in his opinion the cause of the death was a shotgun explosion.

(Testimony of Dr. Homer P. Rush.)

Mr. Kriesien: We objected to that and moved that it be stricken.

Mr. Beebe: Your Honor did not make that——

Mr. Mize: That was part of my motion, Mr. Beebe.

The Court: Yes, I struck that.

Mr. Beebe: Oh, you did strike that?

The Court: Yes. You see, the difficulty is, here this man who is going up a little hill, we find him under a mesquite bush——

Mr. Maguire: Your Honor, at that time he was not going uphill. [353]

The Court: Well, was on fairly flat ground; he had been there for some minutes. I just wanted to correct the record on that. Now, may I consult with counsel on that?

Mr. Beebe: Well, if your Honor please, your Honor was advising us of the difficulty.

The Court: Yes, I think we are all conscious of that difficulty, we don't know just what happened there. This man may have discharged the rifle; he may have had an attack first, and he may have, by some reflex action, pulled the trigger; the trigger might have become stuck on one of the bushes there, or something, we don't know the character of the bush, whether it was thorny or smooth, manzanita or something like that; we are left to conjecture about all these things.

Mr. Beebe: If your Honor please, I have an authority that I should like to submit upon that matter if I may; it was a Federal case where a man

(Testimony of Dr. Homer P. Rush.)

was seen to be driving his automobile and a witness saw him lying back without his hands upon the wheel, and the medical cause of death was a heart involvement. There was medical testimony that the death occurred as a result of injuries, an injury and shock when he hit the telephone pole, and the Court held that that erased a conflict in the evidence. Now, it is our—one of our theories here, if the Court please, that there had to be here an intense emotion, and that by a process of emotion, you see, and because of the surrounding circumstances and [354] what the man found, the only thing that would have precipitated that was the shotgun explosion, and therefore I think it would be proper for the Doctor, if he has a medical reason for believing or having an opinion that the shotgun went off first, to so testify.

The Court: Well, didn't Dr. Chamberlain go into that with considerable detail?

Mr. Beebe: Yes, he did.

The Court: He said, as I recall his testimony, that there was an intense emotional reaction, but I find that a little difficult to assume, because here is Mr. Lyons, he was an experienced hunter, a woodsman. Now, it seems to me almost incomprehensible that the mere discharge of a shotgun, unless in such close proximity to his presence, would have caused this tremendous shock, but ordinarily under ordinary circumstances it would be reasonable to assume that a man of Mr. Lyons build and his preoccupation with hunting, an outdoor

(Testimony of Dr. Homer P. Rush.)

man, that the mere discharge of a shotgun wouldn't normally cause him to have that kind of a reaction.

Mr. Beebe: Yes, your Honor, we agree with that, but we have further this situation, your Honor, we have the fact that it did discharge close to his face, because of the finding of the powder burns, the scratches, and it is common knowledge, something that is known in ordinary life, that the muzzle blast of a shotgun is a terrific blast, and could startle [355] and frighten a man, even an experienced hunter. When he gets powder burned and feels these superficial lacerations, he doesn't know exactly how badly he is hurt. He is probably disgusted with himself for ever letting this thing happen, and therefore we think it could be found that the intense emotion was brought on by the discharge of the muzzle close to his face. Now, I would agree that a hunter, an experienced hunter whose shotgun went off unintentionally and blew a hole in a bush or a fence post or something, probably would not get a severe emotion such as was testified to by Dr. Chamberlain. But we have the additional circumstances there is strong evidence in support to the effect that there was some wounding, that there were powder burns, that this went off close enough so that there were encrustations of powder upon his face, and lacerations, and the Mexican autopsy report shows or describes one hole in the forehead which went in under the skin, at least partly but not in the cranial cavity, so from which could be found something circular

(Testimony of Dr. Homer P. Rush.)

and round, a piece of wadding or possibly one of the shot, also hit him. Then, I think we have the situation here where an experienced hunter had a humiliating experience of this, also he sustained some injury, together with a very loud blast close to his head.

The Court: Well, let's go on with the examination. Your remarks now are, I take it, in the nature of argument. We [356] are not arguing the case, yet.

Mr. Beebe: Now, the answer to the question that the doctor's present belief that the explosion of the shotgun was the cause—so I will go back.

Q. (By Mr. Beebe): Doctor, do you have a medical opinion of the cause of Mr. Lyons' death on February 10, 1953?

Mr. Kriesien: If the Court please, I will object to that. The witness has already answered the question.

The Court: The question has been asked and answered.

Mr. Beebe: But your Honor struck——

The Court: I only struck that portion about the shotgun, if I understand my ruling, that is correct.

Mr. Mize: That was the basis of my objection to strike the whole thing, and your Honor did, as I understand.

Mr. Beebe: I see.

Q. (By Mr. Beebe): Now then, Dr. Rush, will you explain your answer without starting your

(Testimony of Dr. Homer P. Rush.)

explanation with the explosion of a shotgun near the man's face?

Mr. Mize: Ask him whether he could explain it without assuming that.

Mr. Beebe: Can you give an opinion without assuming the explosion of a shotgun as to the cause of his death on February 10, 1953?

A. That's a rather difficult question to answer, because I don't—I can give an opinion as to why I think the man died. [357]

Q. Without assuming the blast of the shotgun?

A. Well, I'd have to assume something started the chain of events.

Q. Well, start with the chain of events but leave out the blast of the shotgun close to his face. For example, if you believe that there was an intense emotion involved, start at that point. In other words, the point immediately following what you said about the blast of the shotgun.

Mr. Mize: I believe the witness has testified that it is very difficult and he can't render an opinion without assuming this condition, and I think the witness should be compelled, or the facts should be stated in the hypothetical question upon which the opinion is requested be stricken, as that has been the purpose of our objections all along. We don't know where we are going on these answers.

Mr. Maguire: Your Honor, I think in the argument perhaps we have gotten a little far afield.

(Testimony of Dr. Homer P. Rush.)

May I consult with counsel a minute? I think the last point of your Honor's ruling——

Q. (By Mr. Beebe): Well now, Dr. Rush, making the same assumption that I originally gave you in the hypothetical question, assume also the exhibits which have been shown you, including the electrocardiogram, Dr. McBride's records which are Exhibits 18 and 19, the Mexican autopsy report, the further examination of Dr. Serrano which you just read, and [358] assume also that during the time that you were with Mr. Lyons for the few days immediately preceding his death, that you were in close contact with him; that on the day before his death you saw him hook a large marlin and play and fight it under moderately severe exertion for a period of 30 minutes; that on the morning of his death, as you described it, he went up a hill walking in sand, and when he got to the top he showed no evidence of any distress or exhibited breathlessness; that thereafter you went to the hunting ground as you explained; that you heard—were standing about 60 yards away and heard shotgun blasts; that you saw two or three doves fall; that immediately following the last time you saw a dove fall, that there was another shotgun blast and you saw no dove fall, and that the sound of that shotgun blast followed more closely than had any of the other shots; that following this second shot by some 10 or 20 seconds you heard stertorous breathing from the direction that Mr. Lyons lay; that you went over to Mr. Lyons

(Testimony of Dr. Homer P. Rush.)

and found him lying face down under—partly under a mesquite bush with the barrel of his shotgun protruding from slightly beneath the left shoulder and the stock of the gun coming out from a point about by the right hip; that Mr. Lyons was then pulseless and cyanotic; that you rolled him over and you felt his chest and that you felt no regular heart beat; but a sensation such as like putting your hand on a purring cat, a purring sensation; that [359] about two or three minutes after you got there a white, frothy substance commenced to come from his lips; that it continued to come for some time, the stertorous breathing continued and the frothy substance at his mouth became somewhat pink; that about some four or five minutes after you had arrived there, the breathing stopped, and that you applied artificial respiration; further assume that at the time you saw Mr. Lyons under exertion on that ship without a shirt, that there was no sign of carotid pulsation in his throat; do you have an opinion as to the cause of Mr. Lyons' death, a medical opinion as to the cause of Mr. Lyon's death on February 10, 1953?

Mr. Kriesien: If the Court please, we object to the question on the grounds heretofore stated and on the further grounds that the question has already been asked and answered, although counsel proceeded to outline in detail the facts of which Dr. Rush had personal knowledge. The original question, he asked him to assume all of the facts

(Testimony of Dr. Homer P. Rush.)

that he had personal knowledge of. The question has been asked and answered.

The Court: I don't think it will do any harm to have it answered.

Mr. Mize: And if your Honor please, I wish to interpose an objection on the same grounds that we made in connection with the previous hypothetical question.

The Court: The record will show that.

Mr. Mize: May the witness be instructed as to the medical [360] cause of death?

The Court: Yes. Will you do that? Just give us the medical cause of death.

The Witness: Yes, that is my opinion, that this man died because of something that initiated a chain of events as follows: One, that his heart rhythm became disturbed so that it could not carry on effective circulation. Two, there is an element of shock with it. Now, the reason I believe both of those existed, is because the autopsy showed an enlarged liver and passive congestion of the lungs. It would take some few minutes before that could develope. I can be certain that he did not have it previously, because I saw him and he was breathing normally, he was not breathing hard until I came back, and I saw him lying on the ground. I believe shock was part of it because he was pulseless. Then his condition was cold and clammy when I touched him. I believe that he had this disturbance in the heart rhythm, because I could hear no heart tone with my ear on his bare chest. I could feel a

(Testimony of Dr. Homer P. Rush.)

tremulous type of activity in his chest. I know that it takes about 20 or 30 seconds before stertorous breathing will start after one has had cerebral pretty well cut down or cut off. I know that after we have a failure of circulation over a short period of time that it becomes marked or acute; that we can begin to accumulate the fluid passing out through the vessel walls in the tissues within 30 seconds. [361] Now, depending upon how acute, it could run probably up to three or four minutes before that might occur. I know with him, that he started his pulmonary edema, which is a fluid that comes out from the blood vessels, or we couldn't have got the fluid in the bronchi in such period of time, and I know by that time he was pulseless, and I know by that time that his circulation had been cut down to a very low ebb, and I know that his respiration stopped, and I believe that they stopped because of the cerebral anoxia that occurred because he had no blood from his shock to return to the heart, and he had passive congestion that damaged vessels and he had anoxia to his heart muscle that would keep aggravating the arrhythmia so that the process became irreversible and his heart finally went from fast ventricular tachycardia into ventricular flutter or fibrillation and asystole and death. And I think that we had involved in it—this was a rather unusual type of sudden death—inasmuch as it involved all four factors that we commonly find responsible for sudden death. They all seemed to be a part in this picture to me. That is

(Testimony of Dr. Homer P. Rush.)

the reflex phenomena that could produce shock and heart arrhythmia, passive congestion which the autopsy findings stated were present, the arrhythmia which I felt myself had to be present with the findings that I found when I was there. Yet, I know it could not have been only arrhythmia because he lived too long, and he couldn't have developed the pulmonary edema [362] and passive congestion had he died from just the arrhythmia. There would not have been the time element. I further believe that this is a rather unusual type of case and I can only draw the conclusions that the primary thing must have been the ventricular arrhythmia, because in sudden death that is caused by any strong emotional factor regardless of what it is. It's felt that ventricular arrhythmia and primarily fibrillation was also the cause of death, but we know that particularly now, myocardial infarction is responsible for it, but this man had an autopsy which showed that he did not have a myocardial infarction. So I then must assume that it was some strong emotional factor that initiated it, because the other factors were not there. Did that make it clear?

Mr. Kriesien: If the Court please, I now move to strike the foregoing answer on the ground and for the reason that he is assuming facts not legally established and in evidence.

The Court: No, I am going to leave that answer stand, counsel.

Q. (By Mr. Beebe): Now, Doctor, in your

(Testimony of Dr. Homer P. Rush.)

opinion, is it possible that a shotgun blast close to the face, which was sufficient to cause powder burns and scratches and wounds such as you described on your examination, is sufficient to bring about a state of medical shock such as you have described in giving your reasons for your prior answer? [363]

Mr. Kriesien: If the Court please, I object on the ground and for the reasons stated and for the further grounds that it requires this witness to assume a fact not legally established and would be based purely on conjecture and speculation.

The Court: Well, we do know that a blast of a shotgun was discharged.

Mr. Kriesien: That is correct, your Honor.

The Court: The only thing we don't know is the time element.

Mr. Kriesien: That is correct.

The Court: We do know that the shotgun blast was discharged. Now, whether it was before or after the seizure, we are left to speculate, but I am going to allow the question to be answered. You may answer it, Doctor.

The Witness: If I understood the question correctly, do I believe that the shotgun explosion could cause the shock, and in my opinion, it could cause it.

Q. (By Mr. Beebe): The corresponding medical shock, yes.

A. That is my opinion, that it could, yes, sir.

Q. Doctor, do you have any opinion as to

(Testimony of Dr. Homer P. Rush.)

whether the shotgun blast preceded any heart disturbance in Mr. Lyons' death?

Mr. Kriesien: If the Court please, I object to that question as falling in the realm of conjecture and speculation.

The Court: I don't think that the doctor's opinion would [364] be very helpful to me in a question of that kind, because frankly, without being—without intending any offense, Doctor, you speculated as much as we can——

The Witness: But I have an opinion on it, if that's what was asked.

Q. (By Mr. Beebe): I mean, based upon medical reasons, that you can sustain by medical reasons, Doctor, and not just by any guesswork?

A. That's what my opinion is based on, that's why I have an opinion.

Mr. Kriesien: I made my objection, and there has been no ruling.

The Court: I will sustain that objection.

Q. (By Mr. Beebe): Is there anything in the time sequence of events which would give you a medical reason or which would support a medical opinion as to the time of the blast with respect to the commencement of the fatal heart attack or heart failure?

Mr. Kriesien: Objected to on the grounds heretofore stated, and falls within the realm of conjecture and speculation, your Honor.

The Court: Objection sustained.

Mr. Maguire: Your Honor, this, in our opinion,

(Testimony of Dr. Homer P. Rush.)

and we may be mistaken, is rather important matter here, and I think for the purpose of the record, if your Honor will permit it, [365] that we would like to make an offer of proof on that.

Mr. Mize: May I make one other ground on my objection, your Honor, and that is that this would not fall within the realm of medical opinion?

The Court: All right, you may include that in it, but I believe I will allow Mr. Maguire to make his offer of proof.

Mr. Maguire: Shall we do it through the witness, with the witness on the stand on an offer of proof or shall we dictate it when the witness is not on the stand; I don't know which?

The Court: I think you had better put it in writing and hand it to me in the morning.

Mr. Maguire: We can do that.

The Court: May we take an early adjournment today, I have an appointment. We will adjourn until tomorrow morning at ten o'clock.

(Whereupon, at 3:45 o'clock p.m., November 28, 1955, an adjournment was taken until 10:45 o'clock a.m. of the following day. [366])

(Pursuant to adjournment proceedings were resumed at 10:45 o'clock a.m., November 29, 1955.)

The Court: Proceed.

Mr. Beebe: Dr. Rush, will you resume the stand, please?

(Testimony of Dr. Homer P. Rush.)

(Witness resumes stand.)

Q. (By Mr. Beebe): Doctor, I may have asked you this, I am not sure, I'd like to ask you one question. Going back to the events just before you found Mr. Lyons under the bush there on the occasion of his death, and referring to the last two shotgun blasts or explosions that you heard before the stertorous breathing can you estimate the amount of time which separated those last two blasts that you heard?

A. Yes, I can.

Q. What is your estimate, Dr. Rush?

A. Two—oh, two or three seconds.

Q. Now, Dr. Rush, I want to ask you some questions about the physical findings in the Mexican autopsy. The translation says, "When the sternum and rib cartilages were lifted, the chondro costal joints were found to be ossified." Is that finding significant in this case?

A. In my opinion, it would not be.

Q. "There were pleuro parietal adhesions of strong type in the posterior aspect of the sternum and left thoracic [367] cavity." Would that physical finding be of significance in this case?

A. I do not believe it would be of much significance, no, sir.

Q. "The right lung was found to be free." Would that be of any significance in this case?

A. No, sir.

Q. "Both lungs were found to be congested." Would that finding be of any significance in this

(Testimony of Dr. Homer P. Rush.)

case, Doctor? A. Yes, I think it would.

Q. What, if anything does it indicate?

A. It would tend to indicate that passive congestion was present, to be one of the findings of heart failure.

The Court: What would bring that about, Doctor?

The Witness: You mean the congestion?

The Court: Yes.

The Witness: Oh, well, it could come from heart failure, and by heart failure, I mean anything that would interfere with the contractility of the muscle of the heart, so that it could not maintain normal circulation.

The Court: Would it also indicate a severe cold?

The Witness: I doubt it, the way it describes that, it would be indicative of a severe cold.

The Court: You did not observe him suffering from any cold at the time you went on the trip with him? [368]

The Witness: I did not, no, sir.

Q. (By Mr. Beebe): "On cut section, black liquid blood seeped out." Would that finding be of significance in this case, Doctor?

A. I think it would have the same significance that the other findings had.

Q. You mean the one that you just explained immediately previously? A. Yes, sir.

Q. "The pericardium was found to be thickened and it had strong adhesions to the diaphragm."

(Testimony of Dr. Homer P. Rush.)

Would that finding have any significance in this case, Doctor?

A. It could have significance in this case. I don't know whether it did or didn't, because it didn't describe where these were. You see, there is quite a space between where the pericardium lies on the diaphragm—one condition in which it could definitely be significant.

Q. What condition do you have reference to which would make this significant in this case?

A. Well, in this case, I don't know that it was significant.

Q. Oh, I see.

A. You asked me if it could be significant.

Q. Well, in what way could it be significant?

A. If you had adhesions between the pericardium and the diaphragm, and those adhesions are in the region of where [369] the big veins from the lower part of the body come into the chest you can get a condition that we speak of as "adhesive pericarditis," and such a condition in that particular location could produce a syndrome that we speak of as Pick's syndrome, which is due to damming back of the vein coming from the abdomen of the blood and it produces passive congestion in the lower extremities, usually first, as opposed to normal passive congestion from heart failure that usually goes to the liver first and then into the lower extremities second.

Q. Now, Dr. Rush, do you have in mind the facts

(Testimony of Dr. Homer P. Rush.)

I asked you to assume yesterday in the hypothetical question? A. I do.

Q. Including the record, excluding the opinion and so forth, is there anything in that which gives any indication that Mr. Lyons had Pick's syndrome?

Mr. Kriesien: Another objection to the question on the grounds heretofore stated, that the hypothetical question does not set forth the facts upon which the opinion is predicated.

The Court: Well, counsel, if there is anything contained in that autopsy report which is based on objective findings, I think it would be admissible.

Mr. Kriesien: I think that is correct, sir.

The Court: And I think that was the pinpoint of your question, wasn't it? [370]

Mr. Beebe: Yes, sir, your Honor. What the doctor has testified is that if these adhesions had been in a given place, that they might have some significance, and now I am trying to find out if on the facts—other facts in the case, the clinical history and so on what was given to him in the hypothetical question, there was any other indication which might tend to throw light on the question of whether Mr. Lyons had Pick's syndrome as Dr. Rush just explained it to the Court.

The Court: I will allow the question.

The Witness: No, in my opinion he had no evidence to indicate Pick's syndrome.

Q. (By Mr. Beebe): Thank you, Doctor. "The

(Testimony of Dr. Homer P. Rush.)

heart was surrounded by a dense coat of fat tissue." Is that fact of significance in this case?

A. In my opinion it would not be of any particular significance.

Q. Why not, Doctor?

A. There are many people that have a reasonable amount of fat on the pericardium, and that of course is the covering that encases the heart, and unless that amount of fat be enough to interfere with the heart function, I don't believe it could be considered of significance.

Q. The next question, Doctor, is: "The left ventricle was slightly hypertrophied." Is that finding of significance [371] in this matter?

A. I would think that that would have some significance, yes, sir.

Q. And what significance does it have?

A. That would indicate that the left ventricle of the heart had had a little extra work to do over this man's life, probably within recent years and therefore had hypertrophied or thickened in order to do that amount of work.

Q. The next statement is, "The semicircular valves of the aorta were thickened and hardened with atheromatous deposits." Is that finding significant in this case?

A. I don't think that is of any more significance than the left ventricular hypertrophy would be.

Q. Now, Dr. Rush, to the statement about the left ventricle being slightly hypertrophied, does that fact carry with it any implication of a danger of a

(Testimony of Dr. Homer P. Rush.)

sudden serious or fatal heart incident initiated or precipitated by some internal cause?

A. No, it does not.

Q. Now then, the statement, "The semicircular valves of the aorta were thickened and hardened with atheromatous deposits." Doctor, in your opinion, does that fact carry with it any implication of danger of a sudden serious or fatal heart incident initiated or precipitated by some internal cause?

A. No, it does not. [372]

Q. "Mitral valve was slightly dilated." Is that of significance in this case?

A. I don't believe it is of too much significance, no, sir, because that is something that could have occurred at the time of his death.

Q. Does a finding on post-mortem that the mitral valve was slightly dilated carry with it any implication of danger of a sudden serious or fatal heart incident initiated or precipitated by some internal cause?

A. It does not, in my opinion.

Q. "The coronary arteries were dissected and they were found to have a diminishment in their caliber due to the presence of atheromatous plaques." Doctor, is that finding of significance in this case?

A. It's rather a difficult question to answer, because it doesn't give one any idea as to how much; one would presume that it couldn't have been terribly extensive, or they would have stated the amount of diminishment.

(Testimony of Dr. Homer P. Rush.)

Mr. Kriesien: If the Court please, I move that the answer of the Doctor, that they would have so stated, be stricken from the record on the ground that he has no way of knowing what they would have stated.

The Court: The motion is granted.

Q. (By Mr. Beebe): Now, Doctor, does that statement carry with it any implication of immediate or danger of a sudden serious or fatal heart incident initiated or precipitated by [373] some internal cause? A. My opinion——

Mr. Kriesien: I object to that question, your Honor, on the ground and for the reason that there is no showing as to what degree there was any obstruction and the Doctor has already testified that he doesn't know. Therefore, whether it would pose any danger or not is not within the realm of this Doctor's testimony at this time.

Mr. Maguire: I'd like to call your Honor's attention to the subsequent examination made by Mr. Kriesien of the Mexican Doctor; in which they said they could not measure it. I think that of itself, it can't be measured, it cannot be of any particular size. I think that adds to that with what is in the statment that the Doctor made.

Mr. Kriesien: To correct you, Mr. Maguire, the answer was not they could not measure it, that they could not state how much it measured.

Mr. Maguire: Well, counsel, I heard it was impossible to say——

Mr. Kriesien: Impossible to say, correct.

(Testimony of Dr. Homer P. Rush.)

The Court: The objection will be sustained.

Q. (By Mr. Beebe): Now, Doctor, assuming the facts that I gave you in the hypothetical question yesterday, and assuming the facts shown in the medical records which are in evidence and the other facts shown in this autopsy, the facts which [374] you yourself saw and related with respect to Mr. Lyons' appearance and activity throughout the time you were with him, and including his activities on the morning of his death, and the facts which you have related and which are in evidence concerning the events of Mr. Lyons' death, and disregarding any opinions of any other experts, do you have an opinion as to whether or not the matters which I have just mentioned to you from the autopsy, taking into consideration the clinical history and all the other matters that I have asked you to assume, do you have any opinion as to whether those things taken together carry with them any implication of danger of a sudden, serious or fatal heart incident initiated or precipitated by some internal cause?

Mr. Kriesien: If the Court please, we will object to that question on the ground that the hypothetical question does not incorporate the facts upon which the witness is asked to express an opinion. Also it is apparent that the medical autopsy did not show the extent of the diminishment of the coronary arteries and for that reason we do not believe that this witness is in a position to answer the question as propounded.

The Court: I believe I would like to hear the Doc-

(Testimony of Dr. Homer P. Rush.)

tor's thinking on that particular question; I will overrule the objection.

The Witness: It would be my opinion that there was—will you state the question again? I have lost my continuity [375] of it.

The Court: Will you read it, Mr. Reporter?

(Question read.)

The Witness: Yes, I have.

Q. (By Mr. Beebe): And what is that opinion?

A. It would be my feeling that there is no evidence to show an internal cause could have precipitated it.

Q. Well, I don't think that answered my question, Dr. Rush. My question was whether all those facts taken together and assuming the man was still alive, if you knew those facts would they carry with them any implication of danger of a sudden, fatal heart incident initiated or precipitated by some internal cause?

A. In my opinion, they would not.

Mr. Kriesien: Just a moment, I will object to that question as the witness has already answered it.

The Court: The answer may go out, but I will rule on the objection. The objection will not be overruled pending my ruling on the objection.

The Witness: It would not.

Q. (By Mr. Beebe): Dr. Rush, would you explain the reasons for your answer? Could you give the Court your medical reason for that answer?

A. Yes. If we take the history of this man as

(Testimony of Dr. Homer P. Rush.)

given in the records that I was shown and has been given in testimony here, [376] he has no story that would suggest any heart strain, except the possibility of his two episodes of chest pain. Now, the first one occurred in about 1950; the next one was in 1953. The first one, apparently there is only one episode according to what the records show, was a pain across the chest going to the arms associated with a weakness in the arms. He had no recurrence of such a pain for three years, so it would be very difficult for me to feel that we could consider that as an angina type of pain due to coronary insufficiency, and have no recurrence with the active life that this man lived for three years as regards his business and as regards his activity and his emotional tensions that he worked under; the business deals that he had. Second, it would be very unusual to have an angina type of pain from coronary insufficiency produce weakness in the arms. It is possible if he had severe enough pain for an individual to be weak, but I can't imagine how it could just choose the arms. The next fact is the fact that he had this pain in 1953 which came on after a very strenuous several days of emotional activity and I don't know how much physical activity was mixed up in that, it isn't stated, there is no statement made in there as to what precipitated this pain, and an examination made at this time, as was also true after the first one, revealed no findings objectively that were stated. It could—the Doctor could have seen that the heart was acting abnormally. Now, pulse [377]

(Testimony of Dr. Homer P. Rush.)

can be counted; blood pressure can be taken; heart size can be determined—as I understand fluoroscopic examinations were done, particularly after the second one; fluoroscopic examinations were done on this man twice a year in 1951 and '2, and certainly if there had been any particular change, the same man having done these fluoroscopies should have been able to detect them, so I would have to feel that there was no physical evidence to indicate there had been any change in his heart between 1950 and 1953, and even after his second episode of pain, we do not have any indication that it had to be an angina type of pain. There are many things that give chest pain. He had no other cardiac symptoms that are recorded in the record any place that I saw. His blood pressure had run within normal range taken several times, his pulse, I think, was, on one or two occasions, reported as being a little bit fast, which anybody might have with pain or particularly with excitement or with worry, and I don't believe that it would have much more significance than that. It would be hard for me to feel that he could have had any serious heart involvement. He had the same findings over a period of three years, had no evidence of any heart strain during these few days I was with him, and we were on a small ship, so that we saw each other very frequently. I saw him work for at least a good 30 minutes trying to land a big fish. I know it was physical effort, and quite severe physical [378] effort, because I saw him tug and pull, and yet, following this, there was no

(Testimony of Dr. Homer P. Rush.)

change in color, no cyanosis nor pallor. There was no distention of the neck veins. The man had no short—he had no shortness of breath, he complained of no pain of any kind. In fact, the only thing that seemed to irk him was the fact that he had lost the fish. Following this, he carried on perfectly normal activity the rest of the day and must have felt very good, because it was his idea that we get up early the following morning to hunt doves, and I believe if he had been tired or fatigued, he would not have been so enthusiastic about it, and the next morning when we got up and went ashore, he hiked around the countryside, including a small hill with no obvious evidence of short breathing, certainly he didn't complain of pain, because I was with him when he was doing this walking. I don't think he was as short of breath as I was on walking up that hill, so when you put all those facts together, it just don't make it possible for me to feel that something sudden was going to happen right then, because there was no change in the pathology in his heart within that five minutes. Now, I would feel that if this man had had some coronary insufficiency, because of the atheromatous plaques in his blood vessels in the heart, that would have been the cause of his death, that we'd have expected to have found evidence of an acute coronary involvement of some kind, such as a coronary occlusion with [379] thrombosis, and I mean an organic occlusion, and——

Q. Will you let me interrupt you? Will you describe what you mean by an organic occlusion?

(Testimony of Dr. Homer P. Rush.)

A. I mean by that, that it is a substance in the artery so that the blood cannot get through. There is plenty of blood present, but it cannot get through it.

Q. What kind of a substance would that be, Doctor?

A. It most commonly would be a clot, and as stated the autopsy certainly did not find any organic clot.

Mr. Kriesien: If the Court please, I move that that answer be stricken from the record on the ground that according to the autopsy report they did not or do not find such a clot.

Mr. Beebe: Well, Mr. Kriesien, it is your questions which I have which are assumed, and I don't think it takes a Doctor to read the translation with regard to the record.

The Court: The mere fact that there was an absence of a clot is noteworthy; isn't it?

Mr. Beebe: Yes, and the Mexican Doctor specifically said, on examination by Mr. Kriesien, that there was no evidence of anti-mortem clot.

Mr. Kriesien: That is correct; I withdraw my objection.

The Court: Overruled.

The Witness: So that I don't know of any——

Q. (By Mr. Beebe): Pardon me, Doctor, for the interruptions. [380] I didn't hear the miocardial infarction.

A. There was no evidence of miocardial infarc-

(Testimony of Dr. Homer P. Rush.)

tion that one would expect to follow a coronary thrombosis, therefore——

Q. Oh, Doctor, pardon me for interrupting you, but what is a miocardial infarction; will you describe it for the Court, please?

A. A miocardial infarction is an area of tissue that has been killed, you might say, or dead tissue because of a lack of blood supply going to that particular tissue, so that a miocardial infarction would be an area of heart muscle that literally has died or become destroyed.

Q. What is the common cause of that, for the Court?

A. Coronary insufficiency? Well, the common cause will be a coronary thrombosis, you can get it from anything that will decrease blood supply adequately fast enough.

Q. Now let me ask you one question, and then you can continue your answer. Are those things that you have just mentioned, coronary occlusion with infarction and thrombosis, are they sudden death matters?

A. They can be, in fact they quite commonly are and I would have expected that the autopsy should have shown some of those factors if the cause of his death was due to, as you stated, an internal reason with the material that has been given me as regards what his physical findings showed, what his history showed, and what the autopsy showed. Now, [381] if we realize that in sudden death we have two factors that are so effectively involved, particularly in

(Testimony of Dr. Homer P. Rush.)

the type of sudden death this man had, one of them being a coronary involvement, as I have mentioned, coronary occlusion and the thrombosis and miocardial infarction, which by itself can produce a change in heart rhythm of a serious nature, that would lead to death. It could also produce shock, which I believe this man had evidence of. It could also produce passive congestion if the man lived long enough for circulation to be maintained that long, but all of those which this man had, there was no miocardial infarction shown, so I don't know how to explain why the heart went into its obvious asystole or change of rhythm so that this man died of any mechanism as regards having its origin suddenly on the inside.

Q. As regards any internal origin; is that it?

A. Yes.

Q. Now, Doctor, with special reference to the matter of the gallstones, I believe that the autopsy shows that there were two gallstones, one, one centimeter in diameter which was located at the union of the systic duct and the common bile duct, the other of three millimeters was in the fundus and it was testified by Dr. Serrano when Mr. Kriesien examined him, that both of those gallstones were free. Now, in your opinion, do the presence of those gallstones or any of the [382] facts shown in the autopsy concerning the bile and so forth, the 40 centimeters of bile, in your opinion are they—are those factors of significance in this case?

A. No, in my opinion they are not.

(Testimony of Dr. Homer P. Rush.)

Q. Will you give your reasons, Doctor?

A. Yes. My reasons are first, according to the history that was given in this clinical story by the two doctors who had examined him, Dr. McKeown and Dr. McBride, he had no story of digestive disturbances. Second, he had no story of jaundice or anything that would suggest that the gallstone had ever blocked the common duct. He had no history of pain that would suggest gallbladder pain, unless those two episodes of pain mentioned could have been due to the gallbladder. He was on a perfectly normal diet while he was with us, and didn't stay away from the ordinary foods we'd expect to upset a gallbladder, if he had gallbladder disease. I think it's further pretty well established that there are many people that have gallstones in an autopsy that never had a symptom and never had any trouble from them. I know that it is not uncommon in women of middle age that have had children, the old axiom used to be "fair, fat, forty, and female," that never had any symptoms and yet you frequently will find stones at autopsy. They never had any heart trouble that the gallstones might have caused.

The Court: Isn't it a fact, that if the stones are not [383] large enough they would dissipate themselves by the absence of fats and other substances in most cases?

The Witness: I don't believe that has been very well established, your Honor, that a stone will dissolve itself.

The Court: At any rate, with a fat-free diet, if

(Testimony of Dr. Homer P. Rush.)

they were relatively small, they would give no particular trouble; isn't that correct?

The Witness: I think that is correct, and I think it is further correct that it doesn't necessarily—or in fact, I would feel that the bigger the stone, the safer it would be, because a big stone in the gallbladder is going to stay there. If they are smaller, they may go out in the duct.

The Court: Well, I tried a case one time where a gallbladder was revealed on autopsy had completely hardened the whole bladder. Is that an unusual situation?

The Witness: That would be a rather unusual situation there, because calcium deposits into the wall of the gallbladder, and it would be a little bit unusual because the stones are made inside.

The Court: All right, pardon me.

The Witness: Gallstones are made of cholesterol stones and of calcium stones and then we have the third one, the mixed stone, and it further stated that these were free, and if they were free then it means that they must not have [384] been caught in the ducts to have produced any particular reflex trouble, or we'd have expected to have found, if they were bound down, particularly the location of a bile stone in such a position, and be free—I might be able to demonstrate that better with a diagram——

Mr. Beebe: May I have this marked for identification?

The Clerk: Plaintiff's Exhibit 42.

(Testimony of Dr. Homer P. Rush.)

(Document was thereupon marked Plaintiff's Exhibit 42 for Identification.)

The Court: I think before you begin the explanation with your diagram, we will take a short recess.

(Whereupon, a short recess was had.)

The Court: All right, proceed.

Q. (By Mr. Beebe): Doctor, you were about to explain to the Court the physiology of this gallbladder matter.

A. Well, I thought possibly it would be easier. Now, he stated the stones were in—this drawing of the gallbladder which is shown here, that I will put a number one on with a circle around it is the gallbladder itself. Now, number two which is circled with an arrow pointing to it, shows the cystic duct. Number three, which we will label the same way shows the hepatic duct, and number four which we will label the same way shows the common bile duct. Now, this is drawn according to scale being six times above average. I mean this takes an average gallbladder—this has been [385] enlarged six times, so we will just make a note up there six times, so that it will give an idea of the comparison of sizes. This was those two gallstones which were just put in here (indicating), it is not the position that they were stated—I am going to label them by calling this, one, supposed to show—suppose we leave it there, so I will label this one A with a circle around

(Testimony of Dr. Homer P. Rush.)

it which is the big one, and I will label this one with B, which is the little one. Now, as stated the big one was one centimeter or ten millimeters in diameter, and that the small one was three millimeters in diameter. The small one was supposed to be in the fundus, where it is located. The big one, however, was stated to be at the mouth of the cystic and common ducts where they come together, which would have placed this stone in this position, which I am showing an arrow which we will put down here the position of A. It was also stated to be free, which is hard to imagine, but it is true we do have this irregularity on the lining which is extended down into the mouth here (indicating) and undoubtedly it must have been enough to have held it in this spot, and by free must mean that it was not impacted in, and as the man never had jaundice, it must mean that it never got out here to block the hepatic duct. The man never had gallbladder pain, unless these two episodes of pain that he had was gallbladder pain. It could not have very well blocked any of these ducts to [386] any appreciable degree or we would have had pain from the contraction of the duct attempting to remove the stone particle. Now, I think that explains the location of where the autopsy says it was, and the comparative sizes.

Mr. Beebe: May the Court please, plaintiff offers Plaintiff's Exhibit 42 for the purpose of illustrating the testimony of Dr. Rush on this point.

(Testimony of Dr. Homer P. Rush.)

Mr. Kriesien: No objection for the purpose of illustrating.

The Court: It will be received for that purpose.

(Document previously marked Plaintiff's Exhibit 42 for Identification was thereupon received.)

Q. (By Mr. Beebe): Now, Dr. Rush, is it possible for a gallbladder disturbance—oh—before I ask that, is 40 ccs. of dark green bile an abnormal finding in a gallbladder?

A. No, it is not.

Q. Now, Dr. Rush, is it possible for a gallbladder disturbance to initiate some sort of a reflex which would cause an arhythmia of the heart?

A. Yes, it is.

Q. Now, returning to the hypothetical facts in the matter you have been assuming, Doctor, and assuming all of those things and with special reference to the gallbladder situation [387] which you have discussed, do you have an opinion whether it is likely or probable in this case that any gallbladder disturbance initiated any arhythmia of Mr. Lyons' heart on the occasion of the fatal incident?

A. Yes, I do have an opinion.

Q. And what is your opinion?

A. It is my opinion that it did not.

Q. And just to shorten it up, Mr. Kriesien; what would your reasons be, the ones you have explained suggest to explain this gallbladder?

A. My reasons for what?

(Testimony of Dr. Homer P. Rush.)

Q. For your opinion that you gave us.

A. All right.

Q. All right, Doctor, will you give your reasons for that opinion?

A. Yes, the reasons for my opinion are as follows: That this man gives no story of having had gallbladder disease. He gives no story of having had any gallstone symptoms. He gives no story of having had a dilated or distended viscus like we'd expect to get if you were going to reflexly have a gallstone involvement or an arrhythmia of the sympathetic or parasympathetic nerves to the heart.

Q. Now, then, Doctor, a few moments ago you were testifying and you defined what you meant by an organic coronary occlusion. Is there some other kind of organic occlusion? [388]

A. The word properly used would, of course, would mean an organic coronary occlusion, but if you don't have an adequate amount of blood going to the heart such as, we'll say a big hemorrhage, so that there is no blood can get to the coronary, you will have the same thing that you would have with an organic occlusion, or one could describe that as a functional occlusion, if you wish.

Q. Now, Doctor, will you explain what you mean by the term "coronary insufficiency"?

A. Coronary insufficiency means that there is not an adequate amount of blood going through the coronary artery to take care of the nourishment of the heart muscle at the time that the heart muscle needs that nourishment. Now, that is a long way

(Testimony of Dr. Homer P. Rush.)

around, but what I mean is a heart that is working needs more blood than a heart that is not working, and where you would not necessarily have to have a coronary insufficiency if it was getting adequate blood at rest, and yet if you would have this individual exercise and his heart did more work, then the artery might not get the amount of blood where you could have a coronary insufficiency at that time, such things as hemorrhage or shock, in which there is not enough blood gets to the heart to be pumped out into the aorta so that it can fill the coronaries without a functional affair, such things as a true narrowing, if it were narrow enough so that it couldn't take the amount of blood needed [389] would be an organic insufficiency. I think you might liken it to an irrigation ditch, that ditch needs a certain amount of water, and if somebody puts a dam in the ditch, why, you have got the water where it can't go through, but on the other hand if the ditch itself is not big enough, you would have the same thing.

Q. Your reference to your first one, would that be organic?

A. The first one would be organic and the second one would be functional.

Q. Now, if the Court please, I wish to put a question to the witness which probably would bring about an objection, because it will seek to elicit an answer upon the shotgun. I wish to do it, because it occurs to me that with the further foundation that has been laid, it may be admissible, and if it is not,

(Testimony of Dr. Homer P. Rush.)

I should like to make it in the form of an offer of proof, if I may.

The Court: That is the matter we discussed yesterday?

Mr. Beebe: Yes, your Honor.

The Court: Do you have it written out?

Mr. Beebe: No, your Honor, I didn't. I got busy working last night, and I did not get to that. I apologize to your Honor, but I worked until three o'clock in the morning, but I did not get it written.

The Court: Well, that's all right, I would suggest that the Doctor be excused temporarily while the offer of the [390] plaintiff is made.

Mr. Beebe: Yes. Then I will have no more direct examination.

The Court: Will you step out, please?

(Witness leaves courtroom.)

Mr. Beebe: May the Court please, the plaintiff respectfully offers to prove as follows: The witness would be asked to assume the same facts which he has been assuming in his testimony in this case, and he would be asked to state whether he has any opinion as to whether there were any outside or any external forces other than the last shotgun blast which he heard, which could probably have initiated the fatal heart incident of February 10, 1953. If permitted to answer the witness would say that he has an opinion, and if asked what that opinion was, he would testify that in his opinion there was no other incident, other than the last shotgun blast that he

(Testimony of Dr. Homer P. Rush.)

heard which likely or probably initiated the fatal heart incident of February 10, 1953.

The Court: Well, counsel, it occurs to me that that matter has been adequately covered by the Doctor.

Mr. Beebe: I think it has been covered by a process of elimination, it has, and now in our effort to make a full presentation, we simply want to present it in the positive form, and we are making our offer of proof for the record.

The Court: I think I am afraid of that question, counsel, [391] I think I would be afraid for the record, too. I think that it has been adequately covered by a process, as you have suggested, of elimination, possibly by sort of a negative approach, but I think I have a complete understanding of the Doctor's reasons for that, and the offer of proof will be denied.

Mr. Beebe: As a matter of fact, your Honor, under the circumstances, the plaintiff will withdraw her offer of proof.

The Court: All right. Mr. Crier, will you get Dr. Rush?

(Witness resumes stand.)

Mr. Beebe: I have finished the direct examination.

(Testimony of Dr. Homer P. Rush.)

Cross-Examination

By Mr. Kriesien:

Q. Dr. Rush, I'd like to have you describe with particularity the material facts upon which you predicate your opinion that you gave that the condition of Mr. Lyons' heart was normal for a man in his age range.

A. Well, I don't know that there would be anything different than what I stated before. There is a man that by autopsy showed apparently some atheromatous plaques in his coronaries, apparently had some on the aortic valve. They state the aortic valve was stiffened and hardened. They state that he had a slight amount of ventricular hypertrophy. Now, I think it's very fair to say in a man of 48 to 50 you can find those things in a reasonable majority of people, and I don't believe [392] that one can state that that's particularly out of the realm of what might be expected in that age group. There are very few people or very few autopsies that I have seen, and I think I have checked hundreds of hearts, that I haven't found some atheromatous plaques in the aorta or the valves and under the coronaries in that mid-age group. It does not state that there was any thrombosis or sclerosis. It doesn't state there was any myocardial infarction. It does not state there is any evidence of fibrosis as though there had been chronic lack of nourishment. It does not state that the valve leaflets were de-

(Testimony of Dr. Homer P. Rush.)

formed. It does not state that the aorta itself was dilated. It does not state that the coronary arteries were interfered with in any way, so it should have been able to function as a normal heart, and must have as this man had no symptoms, had no physical findings that were demonstrated on at least—there were seven examinations that are recorded, and I just have to assume that with a complete negative history, completely negative physical examination, normal electrocardiogram, normal fluoroscopic examination—in fact all of his lab work was normal, except on the uric acid which showed the gouty condition which he had, and it was normal, of course, part of the time it was being treated—I would think that one would consider it a normal heart for the age group.

Q. Dr. Rush, those were dead individuals that you examined [393] their hearts, and they had died of some heart condition?

A. Yes, or other conditions; they weren't all heart deaths.

Q. And, Doctor, I wish you would state with particularity the facts upon which you predicate your opinion as to the medical cause of Mr. Lyons' death, namely, the emotional reaction, medical shock, and into ventricular fibrillation and death. The facts upon which you base that opinion?

A. I believe we can definitely state this man had a serious cardiac arrhythmia, and that's stated upon my own personal findings at the time of his death. When I saw this man he was still alive, he was un-

(Testimony of Dr. Homer P. Rush.)

conscious, he was cyanotic, he showed stertorous breathing, and he gradually developed pulmonary edema. He was pulseless. I was unable to hear any heart tones with my ear against his bare chest. I had no stethoscope. I was unable to feel any heart beat with my hand on his chest. I did feel that I felt somewhat of a tremulous type of movement underneath his chest when I first saw him. Now, he lived for a few minutes after I saw him. I would feel that he must have had some circulation or he couldn't have lived that long. It couldn't have been a ventricular fibrillation all the time or he couldn't have lived that long, and I don't believe he could have had the same chain of symptoms. I think if he had had a ventricular fibrillation from the very start, that he would have suddenly fainted or become unconscious, go into stertorous breathing [394] probably within a matter of 20 to 30 seconds, probably not lived over a minute and a half, and probably would have had no pulmonary edema, and probably would not have developed as much cyanosis as he did, and certainly would not have lasted the period of time that he did. So, he must have had some circulation to produce the passive congestion which was shown by the autopsy, namely, the enlargement of the liver and the changes described in the lungs. I feel that in a sudden death of that type, there are two reasons why it occurs out of a clear sky. One is a miocardial infarction due to a coronary thrombosis, and that is not an uncommon finding, and it is followed by a serious arrhythmia, and not in effect

(Testimony of Dr. Homer P. Rush.)

ventricular fibrillation. It's because of that finding that Dr. Levine advised that quinidine be used to try to prevent such a complication. That was not done on this man's autopsy, therefore something else must have produced it and the other common causes, and when I say common causes, remember that ventricular fibrillation itself is not too common, so that none of these causes will be too common, but emotional tension, of which loud noise has been reported as being one cause, pain, emotional strain or tension caused by any sudden type of reaction, such as an individual that might be a soldier, which I believe is the parallel you used, wouldn't have such an attack when he was going over the top facing the gunfire, but he might well have such an attack when he got home after [395] he had been through such an affair and had relaxed——

Q. Dr. Rush, I don't want to interrupt you; in your giving the common causes of ventricular fibrillation, I'd like to have you restrict yourself to the facts insofar as possible.

A. Well, I said that I thought loud noise——

Q. You have emotional tension and then you have pain that you have raised as two of the common causes; what are the other causes?

A. Well, we stated that miocardial infarction as a result of the coronary thrombosis is the first one.

Q. I was asking about the other common causes.

A. Reflex phenomena is probably more common, is reflexes from the back of the throat or gastrointestinal attacks, although I assume other reflexes

(Testimony of Dr. Homer P. Rush.)

could do it. Certain drugs such as toxic doses of digitalis can do it; quinidine has been known to do it; certain irritating gases; pulmonary emboli. I think that covers it.

Q. What do you mean, Doctor—well, I don't want to get into that right now. Those are the other common causes of the occurrence of ventricular fibrillation?

A. They are the majority of them.

Q. All right, continue, Doctor.

A. I couldn't swear that I might not have forgotten one, but that is the ordinary things.

Q. Continue, Doctor. [396]

A. On what?

Q. You were giving a recital of the facts upon which you based your opinion. Is that all the facts?

A. Oh, no, I thought you asked me about ventricular fibrillation.

Q. No.

A. That's the way I understood the question. Will you read the question again then, please?

(Question read.)

A. Next, as stated, I believe the arhythmia was quite definitely shown by what I saw and felt myself. Next is stated he did not die immediately or he could not have developed the passive congestion which he had. Third, there was some element of shock present. Shock can come from a coronary thrombosis and a pericardial infarction, but as stated, again, the autopsy doesn't show that he had

(Testimony of Dr. Homer P. Rush.)

it, so that something else must have precipitated the shock and also caused ventricular fibrillation, so that we had an individual here that has a negative past history, normal physical findings on several physical examinations, normal electrocardiograms, normal fluoroscopic examinations are reported, and autopsy findings such as slight left ventricular hypertrophy, atheromatous plaques on the coronary vessels, and hardening and stiffening of the aortic valve, some dilatation of the mitral ring and the other findings that go with passive congestion, and gallstones. [397] The two gallstones that have been mentioned, I don't believe any of those are etiological facts, for I think that passive congestion was a result and not a cause. There is nothing reported about the miocardium or the heart muscle showing any degenerative change nor fibrosis nor changes that would suggest that it had been a heart under poor nourishment from coronary insufficiency in a chronic way. There was no dilatation that one would expect if the heart had been under strain very long, so it must have lost its nourishment quite rapidly, and having those factors, plus, as I stated, negative factors on the physical side and history in life, it would seem to me that we would have to explain it on the basis of some outside emotional or outside cause for an emotional upset of some kind. I don't know of any other way to explain it.

Q. Well, then, Doctor, as I understand it, to attempt to shorten your explanation, you base your opinion on a negative past case history and the au-

(Testimony of Dr. Homer P. Rush.)

topsy findings and what you observed at the time of the occurrence; is that substantially correct?

A. And negative electrocardiograms and fluoroscopic examinations.

Q. That was included in my negative past case history. A. O.K.

Q. Now, when did you first ascertain the negative character of the past case history of Mr. Lyons? [398]

A. I don't know that I can answer that question. I don't recall when I first—I got bits of it from the very start from the pilot who had been close to Mr. Lyons for years and was very fond of him, was the one that stayed with him, with the body after this happened, and the rest of them went back to town, to the ship, and in talking to Bob Lyons, he told me——

Q. Bob who?

A. Bob Parrick, I am sorry, and he stated he had no illness, that he had always been strong, couldn't imagine how it could happen to this man; he couldn't understand how it could happen, so that I began to get my first information about it within the first 15 or 20 minutes, and with an individual who had lived quite close to him as an associate, and it was gradually added to by the information I got later by contact with his other doctors.

Q. As a matter of fact, you were advised by Mrs. Lyons that he had been checked over by Dr. McBride and that he was in generally good health?

A. That's right.

(Testimony of Dr. Homer P. Rush.)

Q. When did you first obtain Dr. McBride's medical case history file?

A. Shortly after this occurred, and proceeded to misplace it, and it was not found again until a short time—well, I have forgotten just exactly when it was, it was not too long ago. [399]

Q. Did you read it when you got it?

A. No, I never did; I looked it over when I got the electrocardiogram and I was going to study it, and in the meantime due to some moving, it was misplaced. In fact, I thought it was lost.

Q. But did you go through most of the file, Doctor?

A. I—since then, yes, sir.

Q. I mean at that time?

A. No, I didn't at that time.

Q. Then do I understand you merely looked at the electrocardiogram?

A. No, I probably glanced at the other phases of it. I didn't go through with any particular care as regards drawing a conclusion or anything from that, or having any information to what treatment he had had and whether he had been examined twice a year; I didn't know that until I read Dr. McBride's deposition.

Q. When did you read that the first time?

A. About—within the past month, I presume, maybe not that long ago.

The Court: May we take our recess now? Two o'clock, counsel.

Mr. Beebe: Yes.

Mr. Kriesien: Yes.

(Testimony of Dr. Homer P. Rush.)

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.) [400]

(Pursuant to adjournment, proceedings were resumed at 2:00 o'clock p.m., November 29, 1955.)

The Court: Proceed, gentlemen.

Mr. Kriesien: Dr. Rush, I believe before lunch that you had testified that shortly after the occurrence you had Dr. McBride's medical case history or file and you had made some examination of it, and had not examined the deposition until some time shortly before this trial? A. Right.

Q. Is that a correct statement, that shortly after the occurrence the only information you had concerning the condition of Mr. Lyons' health was your observation that he appeared to be an energetic individual, not under any particular strain from exertion of marlin fishing or from tramping through these hills; he appeared to be in good health and you received the same information from Mr. Parrick, and in addition did you have the findings of the Mexican autopsy report?

A. No, I did not have the entire findings of it, I had a short note that was given me after we had made six or seven trips up to get it, which I assume is sort of a death certificate, the note I had to take to the Governor in order to get permission to take the body out of the country, and in that it stated, I

(Testimony of Dr. Homer P. Rush.)

think there were one or two or three statements, I mean I have forgotten just exactly what they were, but [401] I think it said aortic insufficiency and maybe coronary insufficiency and maybe superficial gunshot wounds. I don't recall just exactly the way it was worded, but it was the only thing I had seen until then.

Q. Now, with the exception of having read Dr. McBride's deposition and having examined the Mexican autopsy report as to the findings, what other material information have you gathered since the occurrence?

A. Since the accident?

Q. Since the occurrence?

A. Yes, since the episode occurred, is what you want to know?

Q. Yes.

A. Well, I seen the electrocardiograms——

Q. Well, just a minute, Dr. Rush. I believe you testified that you had the electrocardiogram and Dr. McBride's file and the deposition?

A. One of them, I think this is correct, I looked at previously. I believe there were two of them there, and I believe the second one may have been in this big envelope that he sent up, but I only recall of seeing the one previous to when I went over this with him the other day.

Q. And which one was that, do you recall?

A. That was the one that showed the technical defect, the one there was a mistake in hooking up the arm leads.

(Testimony of Dr. Homer P. Rush.)

Q. That would be the one in 1950. Well, I will ask you—— [402]

A. If you just open them, I can just tell you from here because it is so obvious. Yes, sir, that's correct.

Q. The 1950 one? A. Yes.

Q. All right. When did you first examine the electrocardiogram of February 4, 1953?

A. I don't know that I can give you that date, it was comparatively recent. Maybe I can make myself clearer and save some of these questions. These were sent up to me by Dr. McBride and they were in a large envelope. At that time I was moving my offices. That went into a group of other papers in a file and I couldn't find it and didn't find it for months, and I believe my wife went through all this material that I had taken home and put in my basement, that I had taken to sort before throwing it away, and found it, and I don't believe that was more than a few weeks ago. I don't recall just when that was. Then, that material included Dr. McBride's notes and some letters—no, let's see—there was some information about Mrs. Lyons in there which was in the same envelope. I sorted it all apart and put all of that that pertained to Mr. Lyons in a clip and gave it to Mr. Beebe, and I did not have—even go over it carefully until later.

Q. Did you say that was a few weeks ago, did I understand you to say? [403]

A. Shortly, I don't know just exactly.

Q. Well, Doctor, just to refresh your memory,

(Testimony of Dr. Homer P. Rush.)

I was furnished with this information, I believe, in November or December of the year 1953; is that correct, Mr. Beebe?

Mr. Beebe: Yes, that is correct. It was at your request I obtained them from Dr. Rush and furnished them to you, and they were in your possession for some time while you had them copied.

Mr. Kriesien: You made them.

Mr. Beebe: Did I make the copies or you?

Mr. Kriesien: Yes.

Mr. Beebe: Well, in any event it was either the last part of 1953 or early part of 1954, if that statement is correct.

The Witness: Well, I am certain that we didn't find those that were mixed up in the other files in my basement until later in 1954.

Q. (By Mr. Kriesien): Well, could it have been in 1954 then?

A. I don't really——

Q. Was it prior to your giving a deposition in December?

A. I don't believe it was. My memory was that it wasn't, but I couldn't be certain of that either. All the records one goes over, I just don't remember it.

Q. Now, Doctor, a few questions on the factual matters of the occurrence. You had known Mr. Irwin, Mr. Lyons' partner [404] for a good number of years?

A. I had known Mr. Irwin for several years, yes, sir.

(Testimony of Dr. Homer P. Rush.)

Mr. Beebe: If your Honor please, I made an error in my statement that it was in the latter part of 1953 or the early part of 1954. I assumed that Dr. Rush's deposition was taken in early 1954. I observe in fact, it was in January, 1955, so it occurs to me that when I furnished you with those, Mr. Kriesien, was shortly before the date of the deposition, perhaps a month or so, and I want to amend the statement that I made to that effect.

Mr. Kriesien: I believe that is correct, Mr. Beebe, we are both off a year there.

Q. (By Mr. Kriesien): Dr. Rush, I believe you testified that Dr. Chamberlain and you and Mr. Lyons were together at the scene of this occurrence, and that Dr. Chamberlain left. Now, Dr. Chamberlain testified on his direct examination that you had been placed up on a hill to where doves would light in a tree, or words to that effect, and he stayed with Mr. Lyons for some 10 or 15 minutes waiting for some birds to come over, and he left to go to the city. Now, does that refresh your memory?

A. Well, that isn't exactly the way things happened. I might have been placed there while Dr. Chamberlain was there, there may have been some doves come over while Dr. Chamberlain was there, but then it ended up—the fact is that Mr. Lyons and [405] I were together right alongside the roadway when the doves really started to come over, and I was moved by the Mexican up towards a tree that was closer to the city than Mr. Lyons was stationed. If I recall Dr. Chamberlain's testimony

(Testimony of Dr. Homer P. Rush.)

correctly, he said that I was further from the city than Mr. Lyons. Well, I wasn't when the accident happened; I may have been when Dr. Chamberlain left.

Q. Was Mr. Lyons hunting from the road?

A. No, he was off the road at the time by a distance of probably—oh, some place between 10 or 20 or 30 feet.

Q. How long had you and Mr. Lyons been separated prior to your hearing the two shotgun shots that we are speaking of?

A. Oh, I don't believe over a matter of 10 or 15 minutes, that again is an assumption.

Q. Now, during that period of time, I believe you testified you could not see Mr. Lyons?

A. That's correct.

Q. And you would have no knowledge of what he was doing during that period of time, insofar as movement or exercise was concerned?

A. No, I would not.

Q. I believe your testimony was that he had moved from—some 30 yards from the point where you left him to the point where you found him in the unconscious state?

A. I don't recall just what the distance was or what I may [406] have said, but it was something in that neighborhood of, I would think, 10 to 30 yards.

Q. Now, Doctor, you seem to place a considerable stress on the time element of the events that occurred, and I would like to have you relate those

(Testimony of Dr. Homer P. Rush.)

time elements with the best degree of accuracy that you can.

A. Well, as I told you previously when I gave my deposition, I was purely estimating them the best I could. These, I am certain of, and that is there was at least one or two doves that Mr. Lyons shot that I saw fall after I was in my new station. I had my back to him at the time, but when I'd hear an explosion, I'd look around and see a dove fall. These were on the wing, as they were coming over as he was shooting them when this double shot occurred; the ones that were close together was much closer than the other two or three shots that had been fired and, as I stated, I saw no dove fall but I had my back to him, and I could well have missed them, but the time element was very short, because the reason—because of this .22 rifle I had, I'd been placed in a position that if I shot at a dove that would light in a tree, I knew I couldn't hit a dove on the wing with a .22 rifle, and I was aiming at one in the tree when he shot a dove, and the dove fell, I was a little aggravated because immediately the doves left the tree and they made one circle and came on back again, and I got ready and another shot was fired, and [407] a dove fell, then before I could even turn around to holler, which was my intention at the time, the second shot went off and it occurred very close after the first of these two double shots.

The Court: Was he shooting at the birds on the wing or on the tree?

The Witness: On the wing.

(Testimony of Dr. Homer P. Rush.)

Q. (By Mr. Kriesien): A shorter period of time, did you say, very short?

A. I wouldn't say it was over two or three seconds between the first and second shot, that again I am merely estimating as best I can.

Q. And is that your best estimation?

A. Yes, that is the best approximation I could make.

Q. Now, were these doves flying over Mr. Lyons at rather a high altitude or a low altitude?

A. They weren't particularly high, no.

Q. And you had your back to Mr. Lyons?

A. Yes.

Q. You could hear the explosion of the shotgun and turn around in time to see the dove fall?

A. That's right.

Q. But you don't know whether a dove fell on the last shot or not?

A. No, I didn't see whether a dove fell, I didn't see one. [408]

Q. You had your back turned?

A. I had my back turned that way.

Q. All right. Now, how long after the last shot was the lapse of time until this stertorous breathing developed?

A. Well again, as I have told you, I don't exactly know. It wasn't very long; it was a comparatively short period of time; it was a longer period of time than it was between those two close shots—I have tried to think back and base it on something if I could, and my reason in estimating that time, I

(Testimony of Dr. Homer P. Rush.)

recall, was I thought at the time trying to figure out about how long it might take to do the acts that I could recall doing, I made an estimation of some place between five and ten seconds, I imagine. Now, it might have been 15 seconds. I don't believe it was shorter than five, and don't believe it was longer than ten to twelve.

Q. Doctor, how long a period of time is it normal for the development of stertorous breathing in an individual?

A. An individual with asystole which it has been——

Q. Now just a moment, explain it in just laymen's terms, if you will?

A. Well, an individual that has been hooked up to an electrocardiogram so that you could see what was going on in the heart, and whose heart stops beating, there is no indication which is physiologically the same as a ventricular fibrillation would be. I think you will even find in the literature that [409] sometimes asystole is described as being standstill or fibrillation of the ventricle, in approximately 20 seconds, it can develop. Now, it's going to vary with people depending upon how fast is the rate as regards the arrhythmia. Now, I made the term asystole, and I have had the experience of having an electrocardiogram connected to a patient going through Stokes-Adams seizures and I have got a record that shows the time. It can be measured, and I have seen it develop in a matter of 20 seconds with asystole.

(Testimony of Dr. Homer P. Rush.)

Q. Is that the minimum?

A. It's the minimum that I have ever seen, but I don't know that it couldn't be sooner than that.

Q. Well, from the time elements you have given me, Dr. Rush, from the shot to the stertorous breathing, you said five to ten and not over twelve. Now, something must have occurred prior to that shot to cause the stertorous breathing if it cannot develop within less than 20 seconds, is that correct?

A. All I can tell you is the way I saw these things and the way it appeared to me.

Q. All right. Now, does that type of breathing also develop pulmonary edema?

A. I think that it's the other way around, pulmonary edema might follow that.

Q. All right. How long did it take you to get from your spot some 60 yards distant down to where Mr. Lyons was? [410]

A. Oh, I—approximately some place like walking a block, I presume, I hurried—I don't know—half a minute, maybe.

Q. Now, you say half a minute?

A. I said maybe. Again, I am estimating as best I can.

Q. All right. Now, you say you hurried. What was the occasion of your hurrying, Dr. Rush?

A. I heard this second shot, then when I began to hear this noise, the stertorous breathing, I wondered if it was—it sounded more like the snorting of an animal—it came from the direction where I

(Testimony of Dr. Homer P. Rush.)

knew Mr. Lyons was and I wondered if he had shot him an animal, that's why the second quick shot, and was possibly in trouble because of one of these wild bulls or something come down, as we had seen cattle in the country not far from us.

Q. So, for that reason you hurried to where he was? A. That's right.

Q. I believe on your deposition, you testified generally, did you not, Doctor, that you came down when you were wary of encountering an animal?

A. That's correct.

Q. And you were looking for a tree to climb and that sort of thing?

A. That's just what went through my mind.

Q. When were you thinking about those things, during that period? [411] A. That's right.

Q. And you believe it was still a 30-second period of time? A. The best I could judge it.

Q. All right then. When you arrived and found Mr. Lyons, I believe you testified that he was cyanotic, pulseless, and unconscious, lying under a tree?

A. That's correct.

Q. Now, what did you do then, immediately?

A. Looked down and I noticed blood on one side of his face and felt that he had shot himself and hollered—I think the first thing I did was holler for help, because I knew that these other hunters were in the neighborhood that were in our party and then looked down and took his pulse and attempted to roll him over a little so I could

(Testimony of Dr. Homer P. Rush.)

get a better look at him, and in the meantime other members of the party arrived up to where I was.

Q. How long a period of time elapsed?

A. Again, I am presuming, purely guessing, a matter of—I suppose another—maybe ten seconds before the Mexican got there and maybe it was another 20 or 30 seconds to half a minute or a minute before Mr. Parrick and the Mexican's son got there.

The Court: Doctor, I think you should attempt to amend that sentence, the word Mexican doesn't look good in the record. I assume you are giving your best estimate; is that [412] correct?

The Witness: That's correct.

Q. (By Mr. Kriesien): And when you turned Mr. Lyons over, was there any evidence of pulmonary edema at that time?

A. No, that came shortly after that.

Q. How shortly after?

A. Oh, I presume another four or five seconds, maybe.

Q. Four or five seconds? A. Yes.

Q. What was it again, I forgot to put that down, the length of time from the time you arrived and turned Mr. Lyons over there and the other parties arrived? A. I don't know that I stated.

Q. Your best estimation?

A. I don't believe I was asked that, I said it was approximately—I thought around ten seconds when the Mexican arrived and between another half minute to a minute before the—or it might have

(Testimony of Dr. Homer P. Rush.)

been even shorter than that—20 seconds to 40 seconds before Mr. Parrick and the Mexican's son arrived, and I turned him over probably within a matter of five seconds after that.

Q. And then a short period of time after that the pulmonary edema developed?

A. That's right.

Q. Doctor, do you recall the circumstances of the taking [413] of your deposition on January 7, 1955, at which time Mr. Maguire, Mr. Beebe, Mr. Mize and myself and Dr. Wilson were present in your office? A. I do.

Q. Do you recall being asked the following questions by Mr. Beebe and giving the following answers to those two questions and answers? "When you arrived there you found that he was pulseless? Answer: Right. Question: That there was proof of pulmonary edema. To me that is sort of a medical conclusion. What was the evidence of it? Answer: I mean by that in his breathing you could hear moisture and a wheezing in his chest somewhat like an asthmatic might have, and with it a whitish frothy sputum was coming from his mouth that had blood tinges in it. Question: That indicated to you pulmonary edema? Answer: That is right." Do you recall those questions?

A. I do, and that is all correct except the time element. I don't know that I was asked as to the time element about when I rolled him over or how quick he began to show it, and I think when you have an accident of that type, when you run up to

(Testimony of Dr. Homer P. Rush.)

see what somebody is doing, that you're not going to specifically argue about whether it's five seconds before you began to see the fluid coming from his mouth or whether he was having evidence of it, and if you want to be technical, probably beginning the pulmonary edema or he couldn't have had all the moisture in his chest, but the true pulmonary [414] edema that I think of clinically, and you are going to get the frothy sputum and that came after I rolled him over and I estimated that might have been five seconds. It was a very short time, as I stated.

Q. Doctor, hereafter when I ask you questions, will you answer it? Then if you want to make an explanation of it, tell us and you can make that explanation of your reasons why you give it. Please do not continue making an explanation without designating them as such.

Now then, after your arrival and finding Mr. Lyons, how long a period was it before Mr. Lyons expired?

A. I do not remember, just a few moments.

Q. A few moments, do you mean by that two minutes, three minutes?

A. I don't—

Q. What is the time element involved wherein an emotional factor or reflex or whatever you are going to call it results in medical shock until one loses consciousness?

A. It depends entirely upon how severe the shock is. There is all degrees of shock.

Q. Well, let's pin it down to do you have an

(Testimony of Dr. Homer P. Rush.)

opinion as to the time element that would have been involved in this instance from an emotional reaction and infliction of superficial injuries until the time Mr. Lyons became unconscious?

A. Yes, I have an estimation as to what that was, and again [415] it is an estimate, I don't know that we can say that it was the shock in this case that caused the unconsciousness, if that's what you meant by your question. I don't know whether I got you quite clear.

Q. Well, is there any question about the fact that medical shock causes unconsciousness?

A. Yes, you can have medical shock—in fact the first symptom in medical shock I believe is weakness and tendency toward vertigo and cold, and unconsciousness lies quite a little ways down, like thready pulse, small veins, pallor.

Q. What caused unconsciousness in Mr. Lyons from a medical fact?

A. It was my feeling that the arrhythmia probably caused the unconsciousness.

Q. And how long would that—that arrhythmia, was that produced by a medical shock?

A. No, I believe it was produced by the same thing that produced the medical shock.

Q. Oh, then, it was instantaneous?

A. The two would come together, I would think.

Q. Now, is angina pectoris any factor in the chain of events of medical shock?

A. Not necessarily.

Q. Can it be? A. It can be. [416]

(Testimony of Dr. Homer P. Rush.)

Q. What was the occasion and the circumstances under which you executed your affidavit as to the cause of Mr. Lyons' death on March 31, 1953?

A. Is that the first one or the second one?

Q. That would be the first one.

A. Because I don't remember the dates they were executed—I was asked to execute an affidavit by Mr. Maguire and he came up to my office, if my memory is right, and I went over the factors I thought were involved and put them down in the shortest concise manner that I knew.

Q. May we have Exhibit Number 7?

(Document handed to counsel.)

Q. I am handing you Plaintiff's Exhibit Number 7. Before proceeding to that, Doctor, I would like to ask you a question as to whether or not at the time of the occurrence or shortly thereafter and prior to the performance of the Mexican autopsy you gave an opinion that the cause of death of Mr. Lyons was the result of heart failure from either a coronary occlusion or infarction or coronary insufficiency?

Mr. Maguire: May I have that question read?

(Question read.)

The Witness: I gave an opinion as to what I thought the cause of death was, that I did think it was a heart death.

(Testimony of Dr. Homer P. Rush.)

Q. (By Mr. Kriesien): You did?

A. I did give that observation to a layman that was standing [417] by me that I thought it was a heart death. I don't know that I explained in any detail what kind of a heart death I thought it was.

Q. I will ask you whether or not you gave an opinion to Mr. Parrick that you did not believe that the death of Mr. Lyons was the result of a gunshot wound, but that you felt it was a heart death from the way he acted clinically?

A. I did, that's correct.

Q. Well, was it your opinion, at that time that you would have expected to find a coronary occlusion and miocardial infarction or a coronary insufficiency?

A. It was my opinion at that time, that I would have expected to have found a coronary occlusion, a coronary thrombosis and a beginning to develop miocardial infarction.

Q. You said nothing about the possibility of a coronary insufficiency?

A. I don't believe that I mentioned anything to Mr. Parrick about either one of them.

Q. Did you feel at that time that the death had been the result of coronary insufficiency?

A. No, I felt at that time that it was an arrhythmia, and that the arrhythmia was most apt to be caused by a miocardial occlusion or a miocardial infarction, and if it wasn't that, then there would have to be some other factor to produce the

(Testimony of Dr. Homer P. Rush.)

arhythmia. That factor, at that time I felt would have to [418] be shock. I didn't believe I went into even thinking it out in my own mind at that time as to what I felt might have caused the shock or the details of the shock or how much it was. I was really a little excited on what was going on.

Q. Did you have an opinion at that time that he had a ventricular fibrillation secondary to a marked coronary insufficiency?

A. I thought that was a possibility.

Q. All right, now, Doctor, referring to the affidavit contained in plaintiff's proof of death, you made the statement, "From my own observations made at the time of his death, which are corroborated by the autopsy report, I certify that James A. Lyons had an underlying coronary artery disease and that when the shotgun was discharged, the explosion and concussion produced a shock which precipitated an acute angina, causing some coronary occlusion and a sudden ventricular fibrillation of the heart which caused his death within five to ten minutes after the accidental discharge of a gun in close proximity to his face." That was your best opinion at that time?

A. That is correct.

Q. At that time, you were of the opinion, were you not, Doctor, that Mr. Lyons had an underlying coronary artery disease? [419]

A. That is correct.

Q. And there was an acute angina involved?

A. I assumed, as I mentioned in my deposition, the term angina was a poor term to use. I have used

(Testimony of Dr. Homer P. Rush.)

several poor terms in there. If you wanted to be medically accurate, I was using the term of a layman as more or less of a synonym for coronary involvement. Angina, of course, as a symptom, means pain which comes from a relative coronary insufficiency.

Q. From coronary insufficiency and that was the term you used?

A. Or artery insufficiency.

Q. All right. What do you mean causing some coronary occlusion?

A. I thought there was a sudden coronary occlusion and had made a complete inefficiency.

Q. And you certify that that was observed or found by your own observations made at the time of his death and corroborated by the autopsy report?

A. Remember at that time, the autopsy report that I had said aortic insufficiency and coronary insufficiency and I had no details.

Q. The autopsy report you had had no reference to some coronary occlusion; did it, Doctor?

A. No; it didn't have an organic occlusion, as I stated this morning, if this man had had adequate amount of shock so that [420] there was no blood going to the coronary, physiologically, there would be an occlusion. The man probably had no angina, either because he was unconscious and wouldn't experience angina, and that is pain, it is a symptom, but I was trying to paint a word picture of what I thought would be found, I was not expecting to be quizzed as to the meaning of the words.

(Testimony of Dr. Homer P. Rush.)

Q. You are not being quizzed as to the definition of words, we are trying to find out what the cause of death was in your opinion at that time.

A. I told you.

Q. Now, your opinion at this time is different from that? A. It is.

Q. All right. Now, when did you change that opinion?

A. When I began to get an adequate amount of information as to what the autopsy showed, not what the conclusions were.

Q. And after you obtained the information as to what the autopsy report showed, then your opinion was different; is that correct?

A. I began to wonder about my opinion and began to check up then on records to see what the clinical records would show; I felt—what I felt was the real cause of death at the start and apparently was not.

Q. You had the autopsy report prior to giving your deposition on January 7, 1953—1955, Doctor, had you not? [421]

A. That is correct, I had the report, I think, within 24 hours before, and I did not attempt to analyze what the translation of the Mexican words might mean. I accepted what they drew as a conclusion the aortic insufficiency, it was there until I found out that there was nothing described in what we saw to verify such a conclusion, so I had to then change my opinion as to having an aortic insuffi-

(Testimony of Dr. Homer P. Rush.)

ciency, then I checked back and reported and found no increased pulse pressure, no evidence of a pounding pulse found by anybody, and no murmurs heard by anybody, then I naturally didn't see it as an aortic insufficiency.

Q. But the fact remains, does it not, Doctor, that you had the information of the findings of the autopsy report prior to giving your deposition on January 7, 1955?

A. I had seen the autopsy report and had information that I thought was correct, but which since then I don't believe was correct at that time.

Q. And at that time you had Dr. McBride's medical case history file, did you not?

A. I had had the language before that, but I had not studied it sufficiently, I told you several times since then.

Q. So that then, what were the facts and circumstances under which you executed a supplemental affidavit on the 10th day of July, 1953?

A. I was informed that this was for trial and more detail [422] should be put in.

Q. Who advised you as to that?

A. I believe it was Mr. Maguire, but I am not certain. It might have been Mr. Beebe.

Q. At that time you had no further information than you had at the time of the preparation of your affidavit of March, 1953?

A. No; I don't believe I did. I don't remember the date of the second affidavit, Mr. Kriesien.

Q. But it follows your first affidavit——

(Testimony of Dr. Homer P. Rush.)

Mr. Maguire: The second affidavit was of July 10, 1953.

Mr. Kriesien: 1953, that is correct.

The Witness: I—the date is probably here—but I don't see it—at the first of it—yes, here it is.

Q. (By Mr. Kriesien): Now, I notice, Doctor, in that affidavit that you do not give a condition of an underlying coronary artery disease.

A. I don't—just where are you, would you point it out?

Q. Well, the point I am making, Dr. Rush, is in your affidavit of July, 1953, did you incorporate the same medical conclusions as to the cause of death? Put it that way?

A. Now, what is your question?

Q. Will you read the question, Mr. Reporter?

(Question read.)

A. Well, I would think that they would be the same. I used [423] the term angina instead of the term coronary disease as I stated, because it was more of a lay term.

Q. Did you incorporate some coronary occlusion?

A. No; I didn't make use of the words "some coronary occlusion."

Q. Yet, at that time——

A. In fact, if you are going to use the term coronary occlusion, I say the word some added in front of it will make some evidence that it either was an occlusion or was not, and some coronary

(Testimony of Dr. Homer P. Rush.)

occlusion would indicate that there must be some involvement as regards coronary insufficiency, that I was trying to point out, and in the second affidavit I used the term angina instead. Angina, as I have frequently stated, is the symptom from coronary insufficiency.

Q. Now, Doctor, prior to your taking—giving your deposition, January 7, 1955, did you go over the translation of the findings of the autopsy with Mr. Maguire or with Mr. Beebe?

A. I went over sections of it; yes.

Q. Did you go over the section which referred to the physical condition or the pathological condition of this man?

A. I went over portions of the section referring to the pathologic condition, I didn't go over the whole pathology at that time.

Q. Why didn't you, Doctor? [424]

A. I had a lot of people to take care of.

Q. So then, what portion of the autopsy were you familiar with at the time you gave your deposition?

A. The conclusions primarily, and the fact that the sigmoid valves or the semilunar valves, so that I knew what part they were talking about and that they had stated there was no involvement of the coronaries and including the coronary insufficiency and artery insufficiency and I assumed those to be correct.

Q. Did you assume as correct the findings of a

(Testimony of Dr. Homer P. Rush.)

diminishment of the caliber of the coronary arteries?

A. I would think that that would be correct, yes, sir; that is an observation.

Q. And did you observe the fact that the liver was enlarged?

A. I don't recall whether I observed that at that time or not, Mr. Kriesien.

Q. Now, is it your testimony, Doctor, that an emotional upset and the infliction by the superficial injuries to the face will solely and independently of all other causes result in death?

A. No; I didn't state that.

Q. Pardon me?

A. I don't believe I ever stated it that way.

Q. I am asking you if you so state—will you read the question?

A. No; I didn't so state. [425]

(Question read.)

A. And I answered I didn't so state, nor would I so state now.

Q. Well, what is the net effect of your statement that there was an explosion, the reflexes and go through to the terminal point of death, isn't that the same question, practically?

A. No; I wouldn't think it was because many people can have a superficial wound and can have an explosion and would not have an arrhythmia that would follow it, wouldn't have shock, wouldn't have

(Testimony of Dr. Homer P. Rush.)

congestive failure. Those other things had to follow those initiating chain of events whatever initiated the chain of events. In fact, if you are going to use one thing on this as the most likely way to express it, but I—what I thought it would be, the arhythmia produced the death. I merely thought the other things caused the arhythmia.

Q. Well, Doctor, is an emotional upset, together with the infliction of superficial injuries such as sustained by Mr. Lyons, a commonly accepted cause of producing this arhythmia and result in death?

A. It's one of the accepted causes; yes, sir.

Q. My question is whether it is a commonly accepted cause?

A. I think you could call it a commonly accepted cause.

Q. Isn't it a very rare thing, Doctor? [426]

A. I think it's fair to say that outside of when there is coronary occlusion with miocardial infarction which will frequently cause arhythmias which will cause death, that probably shock as a result of emotional tension would be just as common as some of the others. It has been known for 25 centuries that shock could produce death and was presumed originally to be a ventricular fibrillation that caused the death.

Q. Would you say, Doctor, that the emotional upset such as shock from the explosion and concussion of the shotgun together with superficial injuries such as sustained by Mr. Lyons, independently of an

(Testimony of Dr. Homer P. Rush.)

underlying disease, could produce coronary insufficiency and result in death?

A. Did I say that it could; is that your question?

Q. No.

The Court: If you would speak just a little louder.

Mr. Beebe: If your Honor please, there have been a number of things I haven't wanted to make any objection to, but at this point I wish to object upon the ground that counsel obviously is paraphrasing from a deposition. He is not giving the witness a chance to hear what the questions were or what the foundations were and I don't think it is fair to a witness to just do that, as I understand it, he ought to be given a chance to know what his answers are and have a copy of the deposition to see what the answers [427] were and what the grounds were for the questions asked him before.

The Court: That is the procedure I follow in my own court, that the witness be shown his deposition, but I didn't want to interfere with any custom you have here.

Mr. Beebe: I believe that is the rule here, your Honor, and I hadn't wanted to insist on it, but at this point, the last one I think was read rapidly and rather unfairly, and the witness obviously didn't get it. I think that if counsel is going to question from that he should mark here the page that he is on and give the witness an opportunity to see what the question was and what the assumptions were,

(Testimony of Dr. Homer P. Rush.)

and in the matter of this, I have to go back myself and find what it is, and it doesn't seem fair.

The Court: I think that is the proper procedure.

Mr. Kriesien: I will not use the deposition without designating the questions. I don't know as to the propriety of giving the witness a deposition to read, I have never heard of that before.

Mr. Beebe: He should be given an opportunity to have one.

The Court: Well, it is uniform practice where I come from to show the witness the deposition; I don't want to intrude on any local rules you have here.

Q. (By Mr. Kriesien): Well, Doctor, to get myself back on [428] the track here, do I understand it to be your testimony that this emotional upset, infliction of superficial pain such as sustained by Mr. Lyons is a commonly accepted cause of a precipitation of a ventricular fibrillation or coronary insufficiency and death?

Mr. Beebe: I think, counsel, it was superficial injuries and not pain, did you mean that?

Mr. Kriesien: Superficial injuries.

The Witness: I don't know how common you could say it is, it is something that can produce it.

Q. (By Mr. Kriesien): Also, Dr. Rush, isn't it possible for an individual to have a fatal heart attack? A. Surely.

Q. Without any prior symptoms?

A. Surely.

Q. And is it possible that, or probable that Mr.

(Testimony of Dr. Homer P. Rush.)

Lyons could have suffered an attack of angina pectoris prior to any discharge of this shotgun?

A. It's possible, certainly.

Q. Doctor, going to the Mexican autopsy report, what is the—what significance, if any, is the finding of a left ventricle slightly hypertrophied?

A. In a man of that age, I don't think that it is of too much significance; I think that it is of some significance.

Q. You say some significance, what [429] significance?

A. That it would be indicative that that heart had probably had a little extra work to do at some time within the past few years previous to his death, anyway possibly the past few months.

The Court: Isn't it a fact, Doctor, that this hypertrophy is found in men much younger than Mr. Lyons?

The Witness: Yes; it is true, if I may——

The Court: They go along without any apparent discomfort and live frequently to a ripe old age?

The Witness: That is correct, and this must have been a very slight hypertrophy, because the electrocardiogram doesn't show any significant evidence of it.

Q. (By Mr. Kriesien): You can have a slight hypertrophy though that does not reveal itself in an electrocardiogram?

A. Yes; I think that that would be possible.

Q. And isn't it a fact that that is also evidence of some degree of aortic insufficiency?

(Testimony of Dr. Homer P. Rush.)

A. Well, aortic insufficiency usually has a marked hypertrophy.

Q. But if there is a mild degree of aortic insufficiency?

A. Well, I don't know how in the world you can have any clinical aortic insufficiency and have a slight hypertrophy. Everyone I have ever seen has been a definite hypertrophy and is shown by electrocardiograms and X-rays and on physical findings, so from my own experience, I would have to say I'd [430] expect much more hypertrophy than a slight amount which would not show on an electrocardiogram, and it is specified by the autopsy surgeon to be slight.

Q. Doctor, I will ask you whether the following question was asked by Mr. Beebe and the following answer given during your deposition proceedings on January 7, 1955, page 93: "Was the evidence of slight hypertrophy of the left ventricle of significance to you? Answer: No; only inasmuch as it would indicate that he probably has had some coronary sclerosis for a period of several months or more, but he was not supposed to have high blood pressure as I understand it, and you have got to have some reason to make the left ventricle larger, and hypertrophy means enlargement, and the other common cause would be some mild degree of coronary insufficiency. If it was a very serious affair—you very frequently do not get hypertrophy; you get this dilatation, so with a mild degree you read here, just you put that as more proof that we had cor-

(Testimony of Dr. Homer P. Rush.)

onary insufficiency. That could also go with this aortic valve lesion, which also cause hypertrophy of the left ventricle''?

A. That's correct, the only way I would change that at the present time is degree, and I assumed then that the hypertrophy was probably more marked than was mentioned, because I expected aortic insufficiency and I presumed it was there. You can get left ventricular hypertrophy from pulmonary [431] atherosclerosis.

Q. Why did you assume it was there at the time you gave the deposition?

A. Why did I assume what?

Q. That this condition existed at the time you gave your deposition?

A. The death certificate that I saw read coronary insufficiency, and I assumed that they must have found some physical evidence to support it or they wouldn't have drawn such a conclusion.

Q. Doctor, you stated that you went over this autopsy, I admit you said not entirely, but this question was read to you from the autopsy report findings.

A. I may have, I don't recall whether it was from the autopsy report or whether it was from this death certificate I saw. Those are the only two documents I had seen, and it would have to be from one of them.

Q. Doctor, in reference to the passive congestion of the liver, is coronary insufficiency the cause of producing that condition?

(Testimony of Dr. Homer P. Rush.)

A. Not in itself, no; indirectly, yes; it can. It's not a common finding.

Q. Now, Doctor, today do you place any significance on the fact that the aortic valve, semilunar valve was thickened and hardened with atheromatic deposits? [432]

A. Oh, yes; you would put some weight on it certainly, but it would not be indicative of a functional disturbance in the way that valve could act.

Q. Could it contribute to creating a coronary insufficiency?

A. I wouldn't think that it, per se, could; no. If you have a true aortic stenosis or aortic insufficiency, yes; it would, but I don't believe because the valve is stiffened that there is any inefficiency in the way the valve works as regards closure, that it would be a factor.

The Court: May I suggest we take a short recess, gentlemen?

Mr. Kriesien: Thank you.

Mr. Beebe: Thank you.

(Whereupon, a short recess was had.)

The Court: Proceed, gentlemen.

Q. (By Mr. Kriesien): Dr. Rush, I will ask you whether the existence of the conditions found in Mr. Lyons' heart are found in a normal heart?

A. I think you should tell me what you mean by normal, because I believe it's fair to say that you will find atherosclerotic plaques in the aorta in the

(Testimony of Dr. Homer P. Rush.)

coronaries of many average parties and individuals of that age group which you would consider as normal from an insurance standpoint if they are to be examined for an insurance policy, as not [433] perfect.

Q. Could you describe some change in the heart from aortic insufficiency and coronary insufficiency?

A. I don't believe it did have, that's what made me change my opinion, when I state that I don't believe there was organic involvement to support it.

Q. Could you yourself, setting across the table from Mr. Lyons, watching him fish, watching him walk, diagnose whether he had aortic insufficiency or coronary insufficiency?

A. I don't believe that I could diagnose that he had an aortic insufficiency, unless he had an acute pain and so forth, an angina—or whether he had, an observation I told you about the aortic insufficiency of any moment, I believe could definitely be told from sitting across the table from a man that had no collar around his neck.

Q. Is there any other type of aortic insufficiency that would be discernible by you?

A. I suppose that at the very start, when it might be beginning to break through, there might be such insufficiency, but I don't believe clinically that it would be of any particular importance at that time, I believe by the time it got to be clinically important, that you would be able to see the increased pulsation of the carotid.

Q. If the man died of coronary insufficiency,

(Testimony of Dr. Homer P. Rush.)

would the diminished caliber of the coronary arteries be a contributing factor to death? [434]

A. I—if a man died of aortic——

Q. No; coronary insufficiency?

A. Coronary insufficiency providing the diminished caliber was sufficient, it would be of importance; if it wasn't, I do not believe it would be.

Q. You cannot tell yourself, and have no knowledge of your own as to the extent Mr. Lyons' coronary arteries were diminished?

A. No; the only thing I had to go on was the description that was painted in the autopsy.

Q. Are there many factors that can produce an acute angina pectoris, Doctor?

A. Well, of course, I think angina pectoris would be considered an acute affair anyway. It's a sudden pain that comes on. It comes on acute and the common thing to produce it is lack of adequate amount of oxygen to the heart muscle or coronary insufficiency. Now, you can get chest pain from many, many other causes but whether you want to call it angina or not would be a different question.

Q. Now, can a—pardon me, Doctor, referring to Plaintiff's Exhibit Number 42, where you have indicated the point that the one centimeter gallstone was lodged or found, would the passage of a stone of that diameter down the cystic duct cause pain and a disturbance in coronary blood flow?

A. It's hard for me to visualize how it could pass down [435] the cystic duct, but if it did pass down the cystic duct, it certainly would produce—now,

(Testimony of Dr. Homer P. Rush.)

well, it would cause a disturbance in the coronary blood flow, but that would be very debatable; it could, but it wouldn't necessarily have to.

Q. Now, what is the degree of pain in a gallstone passing down the cystic duct; do you have any way of describing it? A. It is a very severe pain.

Q. As a matter of fact, that is one of the more severe bodily pains; is it not?

A. That is right.

Q. And can cause, you may—you may resume the stand—that can cause a reflex, can it not, like any other reflex such as emotion, fear, pain?

A. Yes, sir.

Q. Anger? A. Yes; it can.

Q. And an individual can have that condition develop, can he not, for the first time where he is stricken with very severe pain that will go into a reflex and into ventricular fibrillation?

A. I think it would be very fair to say that he has got to have it the first time that the stone is going to get down to the duct, and I think it is very fair to say it could reflexly start a ventricular fibrillation. [436]

Q. And death?

A. Followed by death. But I don't believe a one-centimeter stone could go down a cystic duct.

Q. But, Doctor, the medical—autopsy report has designated the location of that stone, and you are basing your opinion now, not upon any autopsy findings but upon your—just your own opinion?

A. No; I think the stone was there, it is what

(Testimony of Dr. Homer P. Rush.)

was stated, and I have got to accept that the stone is where I made it, but that doesn't mean that the stone was formed in the gallbladder, it could have been formed as a small stone and gone to the cystic duct and had deposits around it, and it could have been forming for five years, it could have been passed out as a stone one millimeter in size and lodged in one of these folds out here in this area (indicating).

Mr. Maguire: Referring to what?

The Witness: Referring to position A where the one centimeter stone was found.

Mr. Maguire: On Exhibit Number what?

The Witness: On Exhibit Number 42. The formation of gallstones is, because there is some type of a crystal that gets started and then from the material around it, there are more of these crystals deposited and it gradually gets bigger, and bigger, and bigger. Now, in the gallbladder where it is more concentrated, it is going to form stones a good [437] deal faster, but there are people that form gallstones over the bladder, and they have been removed before they can get to the biliary tract.

Q. (By Mr. Kriesien): Can they form in any other place and be located at that particular point?

A. Yes; they could form right as I mentioned, I don't know why a one-millimeter stone couldn't pass from the gallbladder and get caught in one of the folds in position A on Exhibit 42, and then after a period of five years gradually have more salts

(Testimony of Dr. Homer P. Rush.)

added to it, and get bigger and bigger and become one centimeter.

Q. That's true, but when the condition occurs, there is a dilation or enlargement of the cystic duct; is there not?

A. Not if it wasn't—it was free—that would produce a dilation if there were a ball and valve affair or if there were a blockage in it, if there is a complete blockage out there permanently, you wouldn't get a dilation, or if it were a ball and valve affair where it would go past the ball and then you could get dilation, but it was stated in the autopsy that this was free, so we have nothing to assume that this was a ball-valve action on it.

Q. Well, this one-centimeter-diameter gallstone going through the cystic duct which is three centimeters in diameter; is that correct, Doctor?

A. I think that that is getting pretty big. [438]

Q. Now, you are talking about the cystic duct?

A. The cystic duct?

Q. What is the diameter of the cystic duct?

A. Well, it varies with people, the same as any anatomical thing, but probably more like third to half of a centimeter would probably be more nearly the average.

Q. Then you would expect, would you not, the passage of a one-centimeter gallstone down a cystic duct that was one third to one half a centimeter to produce some degree of pain, excruciating pain?

A. I wouldn't expect it could pass down.

(Testimony of Dr. Homer P. Rush.)

Q. Would there be any symptoms during its formation, such as colic, indigestion?

A. Not necessarily, colic would occur if you had a stone any place in the biliary system that would produce smooth muscle contraction of the duct, that could be the cystic, or common hepatic duct, common duct, or any of them as regards colic. Indigestion, of course, depends entirely upon gallbladder functions, not necessarily the formation of the stone. Many people with stones have no digestive disturbances.

Q. When they are located in that particular point, the point designated on Plaintiff's Exhibit 42 as position A?

A. No; I don't see why they have to have any more there, providing it was free and there was movement of bile around [439] it, and there apparently must have been because this man never gave symptoms suggesting this.

Q. Again, there also has to be that first attack?

A. Right.

Q. Would there be evidence of reaction in the cystic duct itself?

A. I would think it would be, if you had a stone that just passed through that size, I would expect it to have a good deal of tearing in the mucous membrane.

Q. I can't hear you, Doctor.

A. If it were possible for that stone to go through, which I don't think it would be, it certainly would have to tear the lining and so forth in the cystic duct in order to get through, and I would

(Testimony of Dr. Homer P. Rush.)

think it would be excruciating pain, and I would think that the pathologist should have been able to have shown changes in it.

Q. Now, prior to your testimony here in Court, Doctor, it was your opinion at the time of the taking of the deposition that the emotional upset and superficial injuries would not have resulted in Mr. Lyons' death if an aortic and coronary insufficiency had not contributed to the death; is that correct?

A. I don't believe I made such a statement. I believe I made the statement that having coronary insufficiency and aortic insufficiency, these various factors that you mentioned [440] would be more apt to cause the chain of events than it would if those conditions did not exist. I don't believe I made the statement that they had to be there.

Q. Well, Doctor, referring to page 56 of the deposition proceedings of January 7, 1955, I will ask you if the following questions were asked and the following answers given: "I believe that you testified before that an explosion such as the discharge of a shotgun would not, except in very rare cases, cause death in an individual with a normal heart? Answer: That is right. Question: I will ask you whether or not in your opinion the condition of Mr. Lyons' heart as revealed by the medical case history file and the Mexican autopsy report was a contributing factor medically speaking of the death of Mr. Lyons? Answer: I believe it is correct to state that if this man had not been in the condition he was, he would not have had this reaction from

(Testimony of Dr. Homer P. Rush.)

the shotgun going off next to his ear, meaning by that, that he had the condition of a coronary insufficiency, an aortic insufficiency; which is also exceedingly important, I believe, in this particular case, to allow the reflex reaction from emotional tension to have been much more probably that it would have been in a normal individual by a great per cent. Does that answer the question?"

A. I think that statement is still correct. I don't believe I make a statement in there any place that he had to have [441] any—either one of those conditions. I assumed that he had them because it was reported that he had them. Now I don't believe that he had aortic insufficiency, I feel definitely he couldn't have had in the objective findings and as regards the coronary insufficiency, he could have had plenty of relative coronary insufficiency from his blood pressure and shock because of the blood going to his heart which would give you coronary insufficiency for the moment.

Q. Now, you say due to the objective findings, what objective findings are you talking about?

A. The autopsy findings where they described the valve.

Q. Well, you had that information at the time you gave that deposition, did you not?

A. I did, and I told you that I had not looked it over and had not digested it except in some meager parts.

Q. Doctor, I am going to ask you if the following questions were asked and the following answers

(Testimony of Dr. Homer P. Rush.)

given in your deposition of January 7, 1955, at page 33: "You have examined the Mexican autopsy report? Answer: I have. Question: And are familiar with the findings with reference to the heart condition? Answer: Yes; I am familiar with the translation."

A. That is correct, and that included the conclusion which said aortic insufficiency and the translation I assumed.

Q. Doctor, I assume you are assuming a lot, but you have testified here that you don't recall. You say you just [442] hurriedly glanced at this autopsy report and you weren't too familiar with it, and that is the basis for giving the opinion that you did for that time. Now, you did answer that question specifically, that you were familiar with it?

A. Yes; I answered that I had gone over the report and was familiar with the conclusions that were in it.

Q. Well, Doctor——

A. I don't know that I stated conclusions, I felt that I knew what the pathology of the heart showed at that time, and found out that it wasn't what I thought it was.

Q. Doctor, you were under oath, were you not, when you said that you had examined the autopsy report? A. That's correct.

A. That's correct.

Q. And you were examined in detail by Mr. Beebe with reference to all of the findings of the autopsy report; is that correct?

(Testimony of Dr. Homer P. Rush.)

A. I don't believe that I was examined in detail about all the findings, I don't think it was mentioned about the sigmoid valves and about the coronary insufficiency and about the liver being enlarged and about the passive congestion of the lungs and so forth, and I felt that I had a reasonable understanding of it until I found out that what I thought was meant by hardened valves and so forth, isn't what was meant.

Q. Well, now, how did you find out what was meant by the hardened valves? [443]

A. By having it retranslated.

Q. Well, I believe—may I have the new translation? Are you speaking of the one the doctor just gave in court the other day? A. Yes.

Q. That's the first time you had knowledge of it?

A. Pardon me?

Q. That's the first time you had knowledge of this change of condition; is that right?

A. And that's the first time that I heard the whole thing given.

Q. You mean you have never examined the whole Mexican autopsy report?

A. Oh, yes, but I hadn't at the time of this deposition. I had gone over it, and I had questions that came up, and I had wondered about it, and if we wouldn't get some additional information, and as we got additional information I began to wonder more about it, and wondered where we could get a better translation, I even called up the American

(Testimony of Dr. Homer P. Rush.)

Association, Medical Association in Chicago to find out where we might get a clearer translation.

Q. Did you do that before or after your deposition? A. I did that after the deposition.

Q. Now, what are the material variances between the translation that was produced here in court the other day and the [444] translation that was submitted with the proof of death, which is Plaintiff's Exhibit 9?

A. Well, the differences to me, seem to be this, Mr. Kriesien, that I interpreted——

Q. Just a moment, I want you to tell me what the material variances are between the two translations that caused you to change your entire opinion in this case. Now, I will ask that the—Plaintiff's Exhibit—I believe it's 9, the proof of death——

A. I don't think that I have changed my entire——

Q. Number 7 and the new Mexican translation being—do you have that one that Dr. Christen introduced? May I approach, your Honor?

The Court: Yes.

Q. (By Mr. Kriesien): I am handing the witness Plaintiff's Exhibits 7 and 9.

(Document handed to witness.)

The Witness: I could answer and tell you the reasons for this, but if you want me to look up specifically and find the page and so forth, why, I will have to look through it.

Mr. Kriesien: I can point it out, and perhaps save time. May I approach the witness, your Honor?

(Testimony of Dr. Homer P. Rush.)

The Court: Yes.

The Witness: There is one other factor that comes in it, but where is it? This was—the following are some of the [445] things that made me feel that there was a difference in it and made me go back and reevaluate what these various words mean. First had to do with the description of the artery in the brain in the translation, that is on page 7 in Exhibit 7, it says, “Slightly soft brains. Vertebral, basilar and cerebrum arteries and hexagon of Willis, no alteration. The neck vascular nerves were dissected, having found no alterations.” Then, to go down further, “The heart encreased pericardium with strong adhesions,” and the way it is spelled is E-n-c-r-e-a-s-e-d (spelling); I interpreted that as increased on the diaphragm, and the next is “Fattened and hardened aortic sigmoids with atheromatous pockets.” I thought pockets probably meant there was deformity of the valve, and it was a deformity of the pocket of atheromatous plaques. “The coronary arteries dissected having found atheromatous plates.” Well, if it was true that you had that much on the valve, I wondered how much more there would be in the coronary artery. Now, when reading this one, it was done the other day, it appeared that the translation varied, it said the artery, the cerebral artery and the circle of Willis were found to have no alterations. It doesn’t say anything about a softened brain. “The neurovascular bundles were dissected and no alterations were found.” Then down further,

(Testimony of Dr. Homer P. Rush.)

mentioned that, you might recall that it was like that.

Mr. Kriesien: But the question I am now asking you, Mr. Beebe, is the question that you asked of Dr. Rush, was that from Mr. Wilson's translation or from the original translation that was submitted with the proof of death?

Mr. Beebe: The Wilson translation that we have now is still a later one. My recollection is that the first rough draft of the Wilson translation itself, but it occurs to me that either we had them or we were advised you probably had the Mexican translation that you have there.

Mr. Kriesien: Well, my translation was there, Mr. Beebe, when you propounded your questions to Dr. Rush.

Mr. Beebe: Let me look, I can't be sure of that matter unless I have the exhibit that is attached to the proof of loss, and I think I can soon tell you. Yes, at page 7 of it, for example my translation didn't say a thick layer of fat tissues and then I went on, I believe one translation said gross tissue, so that is why I believe we have the first translation that Wilson made and that I used it. Now, if I can find that point in this——

The Witness: Page 7.

Mr. Beebe: Yes, 7——

The Witness: It was page 7, the one I had.

Mr. Beebe: Yes. Now, my question was from a translation that [449] said the heart was surrounded by a thick layer of fat tissue, and then I said I believe one translation said gross tissue, but this

(Testimony of Dr. Homer P. Rush.)

one says a thick coat of greasy tissue, and I think that gross tissue was a stenographic error of the court reporter. Now, I will look further, on page 88 of the deposition, Mr. Kriesien, the question was, "What would the term 'atheromatous deposits' mean"? The wording attached to—contained in the translation of Mrs. Del Paso which is attached to the proof of loss, and it says atheromatic plaques and it is spelled A-t-e-r-o-m-a-t-i-c P-o-c-k-i-t-s (spelling). So from that, I would assume that we have the first translation that Mr. Wilson made, actually he made a number of those.

Mr. Kriesien: The specific point that I was attempting to make, Doctor, at the time of the deposition proceedings you were in possession when the question was propounded to you with reference to those atheromatous deposits and not this other term that you used that you thought might mean a defect of the valve itself?

A. I had gone over the autopsy report and I knew that it stated that these plaques and so forth, and I had the impression that they were deformed valves at that time.

Q. (By Mr. Kriesien): That is not the answer to my question.

A. If you will repeat it a little bit louder?

Q. All right, I will be a little bit louder. The question I put to you and I will read it to you from page 88 of the [450] witness' deposition of January 7, 1955, the question was: "What would the term

(Testimony of Dr. Homer P. Rush.)

atheromatous deposits mean?" Your answer: "That refers to the plaques that are present in the lining of the blood vessels that are associated with also hardening of the artery"? A. That's right.

Q. Now, that terminology of the atheromatous deposits was not contained in the original translation that you were just comparing to this question of deformity of the valve, and we have in effect what the translation of Dr. Christen was at the time you gave your deposition on January 7, 1955?

A. Well, I didn't have Dr. Christen's at that time when I gave my deposition.

Q. That isn't my question.

A. I thought that you asked me——

Q. My question is that you had substantially in the same form before you on January 7, 1955, with reference to the translation of the Mexican autopsy as you have today?

A. Well then, I didn't interpret it that way——

Q. Well, answer my question, I'd like to have an answer to my question, Doctor.

A. I don't recall what autopsy reports I had, I didn't know there were so many of them to be considered.

Q. These other discrepancies that you have mentioned between the two reports relating to matters that you have considered [451] immaterial to those proceedings, is that correct? A. I did.

Q. That's been your testimony that these various conditions that have been found were immaterial with the exceptions?

(Testimony of Dr. Homer P. Rush.)

A. That's right, I said I did.

Q. So that then in fact, I will ask you again, Doctor, on January 7, 1955, at the time you gave your deposition, you were in possession of substantially all the medical facts that you are in possession of today?

A. I didn't have the same impression. The facts that I had at that time than I do today—I don't know whether I was in possession of them or whether I wasn't.

Q. Well, what is the difference in the impression of the facts?

A. Valve lesions and aortic insufficiency.

Q. That isn't a fact, Doctor, that is an opinion.

A. I assumed from the description of the valve that it was enough to warrant it in my opinion.

Q. You had a translation of the report, Doctor?

A. I know, but translations of the report to me was not clear. That's why I wondered about it and wanted more information. Otherwise, I'd have accepted it and quit.

Q. Why did you not so state at the time your deposition was taken?

A. I didn't realize it at that time; I didn't have any chance [452] to sit down and study over this autopsy. As you know, you came into my office and I was busy, and I went back in the back room and you kept me there all afternoon.

Q. Doctor, that deposition was taken then approximately two years after this occurrence?

A. That may well be, I don't recall when it was

(Testimony of Dr. Homer P. Rush.)

taken, I don't recall what the autopsy report was, I can recall what I thought at that time, and why I thought it, and after I studied things over, I didn't think the same things now as I did then.

Q. I am trying to find out what the facts are that made you have a change of opinion?

A. I'd had—I will tell you just exactly what they were, because I cannot interpret the valves being hardened, and what is the words used—stiffened, I think as being a valve that is incompetent, and I thought that it probably was and I thought that probably had reference to it.

Q. It said thickened and hardened, well, thickened and hardened, and you could not interpret that?

A. I thought that it probably meant a valve that didn't close, and it was through an insufficiency.

Q. What is the fact that is contained in this new translation that changes that condition?

A. Because here I know that a medical man has gone through and translated this one, and I know that he describes these [453] plaques, he described them in a way I have seen them, and I didn't have to worry any more about a deformed valve, because I knew he wasn't drawing any conclusions and I imagine that he would not draw a conclusion of aortic insufficiency if there were no deformity of the valves.

Q. What is the difference between atheromatic deposits and atheromatic plaques?

(Testimony of Dr. Homer P. Rush.)

A. It depends on where they are.

Q. Now, did the new translation of Dr. Christen change the position of those atheromatic plaques?

A. The impression that I got of the whole thing——

Q. That isn't the question that I am asking you, Doctor.

A. It was after hearing him testify, it was much clearer in my mind than it was previously.

Q. My question is this, Doctor, did the translation of Dr. Christen change the position of the atheromatic deposits?

A. I do not know whether it did or not. I don't recall. I didn't memorize either one of them.

Q. Well then, how can you state that it is the reason that you changed your opinion?

A. Because when I went over the one previously and then I went over this one later, and I got my impression of what was one and what the impression was of the other, and I felt that they were talking possibly about an aortic insufficiency.

Q. Now, again, what are the differences in the medical [454] findings in those two reports that would allow you to change your opinion, the medical findings, the facts, not your impressions?

A. Due to the fact that I was certain that this valve was only a hardened and whatever it stated valve, and that it was not a retracted valve.

Q. Where are the facts and findings, I am asking you to limit your answer to that?

A. That's exactly what made me feel—before

(Testimony of Dr. Homer P. Rush.)

there was a debate in my mind as to what the probability was, that I didn't know enough Spanish, and the individual that translated it didn't know enough medicine to make it clear, so I assumed taking the whole report into consideration, that that is what it referred to in that valve.

Q. Now, Doctor, from this new translation, you don't know the extent of diminishment of the caliber of the coronaries or the aortic valve any more than you knew before?

A. I think I do.

Q. What are the facts?

A. I have answered the question the only way I know.

Q. Apparently I am misunderstanding you, Dr. Rush, because I have not gotten any facts as yet. Now, when did you first notify your attorneys as to your new conclusions?

A. I haven't the slightest idea, Mr. Kriesien, whether it was—in fact, I don't think that it was a conclusion that [455] changed overnight, it was a conclusion that gradually I reached in trying to put all the facts together as they were being brought up, then I continued to put them all together to the interpretation that I had originally put to it that there must have been an aortic insufficiency, I don't think the aortic insufficiency is there. I don't think there is a marked degree of coronary insufficiency, other than functional, but other than that I haven't any conclusions.

No. 15412-15413

United States
Court of Appeals
for the Ninth Circuit

UNDERWRITERS AT LLOYD'S LONDON,
ENGLAND, Appellant,

vs.

JANE S. LYONS, Appellee.

GLENS FALLS INDEMNITY CO., a Corpora-
tion, Appellant,

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Transcript of Record
(In Three Volumes)

Volume III
(Pages 465 to 748)

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(Testimony of Dr. Homer P. Rush.)

Q. Well, you certainly have a conclusion as to whether or not a diseased condition of the heart contributed to the heart's death?

A. I think his heart did contribute to the death.

Q. Did a diseased condition of his heart contribute to his death?

A. Depends upon what you mean. It is not a heart that is perfect.

Q. Now, when did you first tell your attorneys about your change?

A. I didn't know that I had made any particular change, other than the fact that I didn't think aortic insufficiency was present.

Q. All right, when did you tell them that?

A. I don't have the slightest idea, some time within the past month or possibly six weeks, I presume.

Q. Then, Doctor, the translation of Dr. Christen could have no [456] bearing upon that change of opinion?

A. Oh, the translation was not the thing that ended it up for me, that made me feel that probably I was right, as I said, that I didn't make that change overnight, I was trying to reason it out, and I couldn't reason it out on why it would say an aortic insufficiency and yet I couldn't get enough information to make me certain it was and yet I had to assume it was because it said so. As I say, I didn't realize that was a conclusion in the first place until later on, I thought it was part of the autopsy report.

(Testimony of Dr. Homer P. Rush.)

Q. Well, Doctor, didn't the autopsy report itself say a conclusion?

A. It probably did, I wouldn't deny it.

The Court: I think we will take an adjournment at this time. Now, I am advised that I have to try a jury case tomorrow and another Thursday. Is that correct, Mr. Clerk? The Clerk informs me that the case I am to try tomorrow by a jury will require two days. What is your pleasure, gentlemen?

Mr. Kriesien: Well, it would appear to me, your Honor, that would take two days, that would be Wednesday and Thursday?

The Court: Yes.

Mr. Kriesien: That would leave Friday, and I do not think we can complete the case in one day, and if I may suggest to the Court, if we could start next Monday and then [457] we could go on without a further interruption.

The Court: I think it is satisfactory to me if I don't have any jury case on the calendar which would interfere with it. Do you have anything for Monday?

The Clerk: Yes, sir; there is another jury case.

The Court: The Clerk informs me I have a case to try that will run into Friday and it will take two days. Is there another case?

The Clerk: The case will run until Friday.

The Court: Well, would Tuesday be satisfactory then?

Mr. Kriesien: That would be satisfactory, your Honor, the only part I had in mind, was to prevent a further interruption in the trial.

Mr. Beebe: I have this problem that I can't report quite accurately on to your Honor, I was set to try a case before Judge Solomon on Thursday, I spoke to him during the afternoon recess, and apparently he was assuming that he still had the case, and said he could try it next Tuesday, other than that it would have to go for a long time, and then after that I was advised that the case had been set for jury trial on Thursday, I believe Mr. Kenyon told me, but the man doesn't know that yet; I would say this, your Honor, that I should probably consult Judge East or whoever has that case and report back to the Court.

The Court: Is it a Court case? [458]

Mr. Beebe: Yes; it is, your Honor, it will not be before a jury.

The Court: How long do you estimate it will take?

Mr. Beebe: The estimate has been two days.

The Court: Let's set this case tentatively for next Tuesday, and if anything happens to conflict, we can make further arrangements.

Mr. Kriesien: That is satisfactory, your Honor, providing we have notification of it. That's at ten o'clock, your Honor?

The Court: Ten o'clock. The Court is adjourned.

(Whereupon, at 4:15 o'clock p.m., November 29, 1955, an adjournment was taken.) [459]

(Pursuant to adjournment, proceedings were resumed at 10:00 o'clock a.m., December 7, 1955.)

(Dr. Homer P. Rush resumes stand.)

Cross-Examination

(Continued)

By Mr. Kriesien:

Mr. Kriesien: May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Kriesien): Dr. Rush, when we adjourned a week ago Tuesday, you were testifying about aortic insufficiency and whether the translation designated that term as being a conclusion. I will hand you Plaintiff's Exhibit 7 and call your attention to the translation and ask you whether or not the only reference to aortic insufficiency follows the word, "Conclusions," and that word is capitalized?

A. It probably does, the word is capitalized. I don't know whether it is any place else in this or not.

Q. Well, would you look at the findings?

A. Well, if you say it is—it probably isn't—I would trust your reading of it, I would answer that question if you have gone over it and checked it.

Q. I can assure you that it was in it.

A. But in explanation, I wish you would read my deposition in which I told from the translation that I thought was in here that there was some cemented and covered valves which [460] is a lot different than what this translation states. This translation, the one I had access to at the time I gave my deposition.

(Testimony of Dr. Homer P. Rush.)

Q. I believe, Doctor, that Exhibit 7 is the first translation that was made and that accompanied the proof of loss.

A. And I don't—it may have been—I didn't see it. I saw but one translation that was made by Mr. Wilson, and at that time I talked to Mr. Wilson and asked if he had gone over it, if he would go over it and make certain of those words about cemented and covered. None of that is stated in this one at all, but that is in my question and I answered it in my deposition.

Q. Well, Doctor, to refresh your memory, that proof of loss and your affidavits were submitted in the year, 1953. Now, Doctor, I will hand you Mr. Wilson's translation being Plaintiff's Exhibit 23, and directing your attention to page 17, I will ask you whether or not the only reference to aortic insufficiency follows the word, "Conclusion," and that is capitalized?

A. I will state that it probably is, we won't take the time to read it, but I, in explanation of it, I was told, that was before this had been translated by Mr. Wilson, that it was worked over, and I never saw this one after it was worked over.

Q. Now, Doctor, is the term "aortic insufficiency," in [461] effect a medical conclusion rather than a medical finding?

A. I think that the term aortic insufficiency is a term that is used when the aortic valve is incompetent and doesn't hold, and it's a description that has resulted anatomically, that is based, at least, on the American heart criteria. We speak of it clini-

(Testimony of Dr. Homer P. Rush.)

cally as aortic insufficiency or aortic ingurgitation or aortic incompetency, which are probably similar types. I think the difference is according to clinical and anatomical.

Q. Thank you, Doctor. Your Honor, could I have that window closed? The light is right in my eyes. I cannot see the witness.

The Court: Yes.

Q. (By Mr. Kriesien): Doctor, at the time you gave your affidavit in March of 1953, where you certified that Mr. Lyons had an underlying coronary artery disease, I will ask whether or not that opinion was based upon the fact of an aortic insufficiency or cementing and hardening of the valves?

A. No; it was based upon the fact that I did not know about the aortic insufficiency in detail; if you will check in the deposition, if you will refer to my deposition, I told you when I cleared that up and when it was brought up at the time of my deposition, and I made the statement then that there is something new that was added, but that if there were it would increase the coronary insufficiency as regards the [462] function of the coronaries.

Q. Then you did not take that into consideration in arriving at an opinion, in March of 1953, that Mr. Lyons had an underlying coronary artery disease and a coronary insufficiency?

A. I did to a certain degree, because that was the only thing stated on the death certificate.

Q. Doctor, as a matter of fact, in giving your

(Testimony of Dr. Homer P. Rush.)

opinion on your deposition, you considered the material things to be the atheromatic deposits on the aortic valve and the diminished caliber of the arteries; did you not?

A. I don't believe I can answer that question yes or no. Again, the statement that I made in my deposition, I believe is, if my memory is correct, I stated that I felt one of the conditions could occur, either death or involvement of the miocardium with irritability that went into all these things that we are talking about, the shock and what have you, finally ending up with ventricular fibrillation or flutter fibrillation or a second factor, and then you went on to question me about these things and the second factor wasn't recorded on it until much later, in which I stated that I would have expected to have proven a miocardial infarction and a coronary occlusion because of this being so common as a follow-up to miocardial disease, secondary to a coronary occlusion of an organic nature. Those were the two suppositions I had in mind. I didn't state the aortic insufficiency, [463] I had no details on it except what was given me at the time I gave my deposition previously, and those were the two factors previously which I gave in my first affidavit.

Q. Now, Doctor, that doesn't answer my question. My question was whether at the time you gave your deposition you considered as the material things, the atheromatous deposits on the aortic valves and the diminished coronary arteries?

A. I considered it as part of it and the other

(Testimony of Dr. Homer P. Rush.)

factor, the other part—until I could get the details, I don't know which it was.

Q. Now, Doctor, I will ask you whether the following question was asked and the following answer given on your deposition of January 7, 1955, page 92: "Question By Mr. Beebe: That apart from that, insofar as I have read to you what they had to say about the thorax, the material things are the atheromatous deposits on the sigmoids and the diminished coronary arteries; is that correct? Answer: Correct."

A. That's undoubtedly what I stated; yes, sir.

Q. Now, Doctor, on your direct examination here, you stated in effect that Mr. Lyons had a normal heart for a man in his age range. Doctor, now I will ask you if the following question was asked and the following answer given your deposition on January 7, 1955, page 94.

Mr. Beebe: Just a moment. Would the witness like to [464] have a copy of his deposition?

The Court: Well, let him see one if it is available.

The Witness: I have one in my briefcase. I am sorry, Mr. Kriesien.

Q. (By Mr. Kriesien): Page 94.

A. And the question?

Q. I was just asking you the question by Mr. Beebe, "Assume that a man had a heart with a left ventricle slightly hypertrophied and the atheromatous deposits on the semilunar valves and a diminished caliber of his coronary arteries and had no more symptoms than have been brought out here about

(Testimony of Dr. Homer P. Rush.)

Mr. Lyons, what is your opinion as to the condition of that man's heart as to whether there was any active heart disease there? Answer: Well, I think that one would have to assume that with that amount of involvement that he had abnormal pathological findings in his heart and that one would expect that to be somewhat progressive as years went on," then continuing on about knowing of individuals that lived with that condition?

Mr. Beebe: Why don't you read the rest of it, Mr. Kriesien?

Mr. Kriesien: I will if necessary.

The Witness: That statement is, I believe, correct, but in explanation of it——

Mr. Beebe: Just a moment, Doctor, I want counsel to read the rest of your testimony.

Mr. Kriesien: That is the important part. [465]

The Court: The rule is that you may read certain parts of the deposition in here, and then if you wish to read any more you may do so.

The Witness: I think that that statement is correct, but in explanation of it, I would like to state that previously I had been told about the aortic valve being cemented and covered and I naturally assumed that that was in this question that occurred later, I didn't know that they would change the pathology of the valve within ten pages, and I was using that same assumption regardless of the terminology that you used as a layman.

Q. (By Mr. Kriesien): But nevertheless, that is

(Testimony of Dr. Homer P. Rush.)

not, or that description is not incorporated in that question, Doctor?

A. No, it isn't; but I was trying to arrive at a conclusion that I thought would be helpful in deciding the cause of death, and naturally I took in all the factors that were important here, but I didn't realize that Mr. Beebe was trying to leave one factor out and the other factor in, that he didn't say that it was changed, and that before it did make this statement of cemented and covered.

Q. Doctor, you didn't have that information at the time you gave your affidavit, did you?

A. No; I didn't have it at that time, I just had the conclusions, and I supposed that was the reason for the conclusion. [466]

Q. Doctor, you stated in your direct examination that the condition of Mr. Lyons' coronary arteries was of no medical significance in causing his death. Doctor, I will ask you if the following questions were asked and the following answers given on your deposition of January 7, 1955, page 88. Doctor, continuing on the coronary arteries this is a question by Mr. Beebe. "Doctor, continuing, the coronary arteries were dissected which were found to have diminished caliber due to the atheromatous plaques, now what would that mean? Answer: That would indicate that the coronary arteries were decreased in size because these atheromatic plaques had piled up on the lining of them, therefore coronary insufficiency."—see page 89—

A. Wait a minute, I don't find your reading—

(Testimony of Dr. Homer P. Rush.)

Q. At the bottom of page 88.

A. And would you mind reading again so that I know where it was started?

Q. I will read it to you again. Question by Mr. Beebe: "Doctor, continuing, the coronary arteries were dissected which were found to have diminished caliber because of the atheromatous deposits, now what would that mean? Answer——

A. I don't find where you're reading, I am sorry.

Q. Start at the bottom of page 88.

A. Yes; and then it goes over to 89?

Q. "Answer: That would indicate that the coronary arteries [467] were decreased in size due to the atheromatic plaques that had piled up on the lining of them, therefore coronary insufficiency." That answer was given, Doctor?

A. That's what I thought at that time, that's correct, sir.

Q. If you will turn to page 90 in the middle of the page, question by Mr. Beebe: "Now, then if also the coronary arteries were diminished in caliber because of the atheromatous plaques? Answer: That means that the blood that did get into these ostia would have more trouble to get to the heart muscle because they were of small caliber. Question: Would that latter condition increase the difficulty you have mentioned which was existing because of the deposits on the aortic sigmoid or semilunar valves? Answer: Yes; it would. In other words, either one of them could cause a definite decrease of amount of coronary blood flow. When you put them both to-

(Testimony of Dr. Homer P. Rush.)

gether, you would have just got two factors." That answer was given?

A. That answer was given, but the facts are—why didn't you read what was on page 91 in which I was given the information?

Mr. Mize: Just a moment——

The Witness: It was a——

Mr. Mize: Just a moment, Doctor. You conducted the examination, Mr. Kriesien, therefore, you make the objection. [468]

Mr. Kriesien: And I was attempting to stop the questioning——

The Court: Let's not all talk at once here, let's get some order out of this. Counsel does not have to read anything that he does not wish to read, the attorney for the plaintiff may read such portions as Mr. Kriesien leaves out, if he so desires.

The Witness: I am sorry, your Honor.

The Court: So that any explanation you will give, you keep that in mind.

Q. (By Mr. Kriesien): Doctor, on your direct examination you stated in effect that the emotional tension or upset such as the discharge of the shotgun close to the face could cause death, and that the condition of Mr. Lyons' coronary arteries were of no medical significance. I will ask you if the following questions were asked and the following answers given during your deposition of January 7, 1955, page 43 at the top of the page: "Question: Coronary insufficiency. Doctor, what are most common—Doc-

(Testimony of Dr. Homer P. Rush.)

tor, if a person had a normal heart could a psychic trauma or emotional upset such as a shock from the explosion and concussion of a shotgun together with superficial injuries such as sustained by Mr. Lyons, independently of all other causes and not contributed to by disease, produce a coronary insufficiency and resulting death? Answer: In my opinion it would be very, [469] very rare. I do think that such a thing is possible as has been demonstrated in some of the South Sea Islanders, where they make up their minds that today is the day they are supposed to die, and they go out, have a big celebration and they go down and die, and which is quite a mystery to medicine, and by check-ups carried out by English physicians they apparently have to do with some type of nerve-emotional reflex that cuts coronary artery flow, so I think—I do not know whether these individuals were all normal or whether they were not, but an individual that has coronary artery disease would be much more apt to have an emotional upset like the explosion of a shotgun close to his face—correction—explosion of a shotgun cause his death than would one that did not have it. Question: And the one that did not have some coronary or heart disease, it would be the exception? Answer: That is right. Question: Rather than the rule? Answer: Definitely. Question: If the psychic trauma or emotional upset—— Answer: Definitely the exception. I think it would be a very, very rare thing. I have never seen or heard of one other than these reports from the South Pacific.” Those questions

(Testimony of Dr. Homer P. Rush.)

were asked and answers given; were they not, Doctor?

A. That's right, but still in explanation, I don't think it is fair to make out one thing and not put in the other that was present ahead of it that was also used in my deposition. [470]

Q. Doctor, in your many years of practice and specializing your profession, have you ever had occasion to certify that the sole cause of death was emotional upset or reaction?

A. I never have, no, sir.

Q. Well, Doctor, will you describe in detail the injuries to Mr. Lyons' face?

A. I don't believe I recall them in detail, so I don't believe I could describe them in detail. My impression was that they were rather superficial, I thought they involved the neck, I believe, more than the face if my memory is correct, and that he had what I felt was one shot that might be under the skin, because there was a little hard nodule that I felt and there was surprisingly little loss of blood, when one looked on the ground where the man had been laying, and I assumed at that time that this explosion had gone off close to him, but that he had just gotten the edge of the force of the shell, and not, of course, any great amount of it or he would have had much more injury than that. Now, that is about as far as I can give in any detail on it.

Q. Well, would you agree with the findings of the Mexican doctors in their autopsy report, which reads, "Crust of dried blood on the right and left

(Testimony of Dr. Homer P. Rush.)

side of the face being more abundant on the former, on being removed, there was encountered incrustations of grains of gun powder in the regions of the outer edge of the eyelid and the lobe of [471] the right ear, skin scratches in rounded lines distributed irregularly on the rest of the face. There is found a circular hole with indented edges approximately one millimeter in diameter on the right side of the forehead at the hairline. On the neck there were found dried blood that on being removed left in its place scratches in the skin in irregular distribution and limit, but more precise than those on the face and which varied approximately from one-half to one millimeter in length. Moreover, scratches in the skin on the outer face of the upper arm in its lower third, elbow, back outer face of the forearm and back of the right hand." Do those substantially describe the conditions as you observed them at that time?

A. Well, I didn't observe anything on the arm or on the back, of course, he still had his shirt on when I saw him. I felt that it was on the face, and my impression that it was more on the neck as against the face, as I recall, but I presume that is an accurate description, I have no reason to doubt it.

Q. Doctor, in your opinion, could these injuries that I have just described, solely and independently of all other causes result in Mr. Lyons' death?

A. No, I don't think that the scratches on his skin caused his death. I think it was the shock that went along with it. [472]

(Testimony of Dr. Homer P. Rush.)

Q. Now, Doctor, in giving your opinion on your deposition, and I assume at the present time, as to the precipitating cause of this man's death, you did not consider those superficial injuries or any pain from them to be of any medical significance in the chain of events, did you?

A. I did not think that that was very significant, no, sir.

Q. And your opinion, throughout your deposition, was based upon a fear or emotional reaction, rather than anything developing from the injuries themselves?

A. I would think that that was responsible for probably a good 80 per cent of it, and the other would be 20 per cent or less.

Q. Now, on giving your deposition, did you indicate the fact that any pains from those superficial injuries might be a contributing cause?

A. I don't recall that I mentioned pain specifically, and I assume that everyone realizes there is pain with an injury.

Q. Doctor, I will ask you whether the following questions were asked and the following answers were given on your deposition of January 7, 1955, commencing at page 54. "Question: Partially, Doctor. Let me ask you this question, then: Then, as I understand it, it is your opinion that this emotional reaction or upset—I am not quibbling over the words there—was the more probable cause of the disturbance in the coronary blood flow rather than

(Testimony of Dr. Homer P. Rush.)

angina pectoris, a gallbladder colic, [473] or some unknown cause or factor? Answer: When you put the term angina pectoris in it, you are adding a term into it which I believe is a part of a general chain of events, and I cannot say that the emotional factor caused the death and not angina pectoris, because I believe he did have angina pectoris although we have no proof for it. I don't believe gall bladder disease or some other unknown reflex was responsible for it. Mr. Kriesien: Off the record. (Discussion off the record.) The Witness: Well, it seems to me that this man had a sudden explosion of this powerful shotgun by his face, the cause of which I don't know, but that he must have been upright because there was no evidence in the brush or dirt to indicate that it exploded when he was down, that the superficial wound was very slight, and, therefore, it was the emotional mental fear of what went on over the next two or three seconds that caused the reaction that I believe caused a change in coronary blood flow that produced a chemical change in the ventricle that could allow for ventricular fibrillation to develop, which did in all probabilities, and produced a passive congestion as has been demonstrated with autopsy, which was the cause of death. Question: That opinion, of course, Doctor, is predicated upon the fact that the shotgun was suddenly exploded prior to a seizure of an angina; is that correct? Answer: Correct."

Those questions were asked and those answers given at that time? [474]

(Testimony of Dr. Homer P. Rush.)

A. Yes, sir, that's the way I have it. I think again it ought to be pointed out in explanation that that wouldn't necessarily be the only thing of the seizure of angina. We don't know—angina is a symptom, it is a certain term used to express pain, we don't know whether he had pain or not, because he was unconscious, but we do presume that he had angina.

Q. You are assuming or speculating?

A. Well, I don't know, what is the difference?

The Court: Let's not get into semantics.

Q. (By Mr. Kriesien): All right, your Honor. Doctor, in your many years of practice, you have known of many cases, have you not, where individuals have discharged guns and inflicted rather grievous injuries to themselves and has not resulted in death?

A. I don't believe I can state that I know of very many cases that had that happen, but of course, I am not in that type of practice, so I probably wouldn't.

Q. Doctor, do you know of cases where individuals have dropped dead of heart attacks while they are hunting? A. Pardon me?

Q. Doctor, do you know of cases where individuals have dropped dead of heart attacks while hunting?

A. I don't know of any, but I have heard of them, there is no doubt but what they have occurred. [475]

Q. Now, Doctor. this occurrence on February

(Testimony of Dr. Homer P. Rush.)

3rd, 4th and 5th of 1953, of Mr. Lyons when he had constricting chest pains and arm radiation pains and nitroglycerine was prescribed and he was advised to refrain from tramping through the fields, doing any heavy lifting; was that, or is that indicative to you that Mr. Lyons, on those dates had a condition of coronary insufficiency or angina pectoris?

A. It was—that's one of the things that made me reach the decision I did in this deposition I gave in January. On the other hand, I think that it's only fair to state that there is no evidence that I know of that Mr. Lyons ever took nitroglycerin. This pain, if it was a continuing pain for three days, would not be typical of angina, and that's what I learned since then as to what has been testified to up here, and the other factor is that an electrocardiogram was taken which don't show evidence that we'd expect to get with a definite coronary insufficiency that would cause three days' pain, so it makes me wonder after all the data is accumulated whether it was angina. Of course, if there was, I would be inclined to believe that it was caused by that at the time.

Q. Well, Doctor, what evidence is there in this case that it was a continuing pain for three days?

A. That's the impression I got from what was testified to.

Q. The testimony was that he complained of pain on those three days, you don't know whether it was continuing or whether [476] he had one continuing or whether he had one attack of pain, do you?

(Testimony of Dr. Homer P. Rush.)

A. No, but I was told that it occurred in the evening when he wasn't working, which of course, wouldn't be from work.

Q. To refresh your memory, Doctor, that came from Mrs. Lyons, who advised of the first attack on February 3, 1953, that he had some pain on that night, and I don't believe there is any further testimony of it being a continuing pain. If I am wrong, I would like to have you correct me.

A. I couldn't answer the question. It's just unusual to have a continued pain and that was what I thought was stated.

Q. Doctor, with continuing pain, does that sometimes indicate a coronary occlusion?

A. It does. Usually the pain is severe enough so that they need some type of medication to relieve it.

Q. Doctor, have you checked into what the drug Thaverine is? A. I have.

Q. What is it?

A. Thaverine is a drug that can be referred to as a paradiator and setter.

The Court: How do you spell that?

The Witness: T-h-a-v-e-r-i-n-e (spelling), I believe that is correct, your Honor.

Q. (By Mr. Kriesien): And what is the purpose of the use [477] of that drug, Doctor?

A. Well, I presume it would be used any time that one would expect spasms in the blood vessels.

Q. And do you mean by spasms in the blood vessels, spasms in the blood vessels of the heart?

(Testimony of Dr. Homer P. Rush.)

A. And I would think that that would be one of its uses, yes, sir. I have never used the drug. I did not know what it was until I looked it up according to Dr. McBride's notes that I had an opportunity to look over when you gave them to me the other day. It was considered—I don't believe it was stated—how was it?

Q. I stated that he prescribed it, I believe, Doctor.
A. Yes.

Q. Doctor, immediately prior to this occurrence, Mr. Lyons had been engaged in rather strenuous exertion walking up and down sand hills; had he not?

A. No, I don't believe that it was strenuous exertion, he had been under some exertion walking up a path on a sand dune that was a little uphill.

Q. Doctor, isn't exertion a commonly accepted precipitating cause of a coronary insufficiency in an individual who has coronary sclerosis?

A. I think that is correct, but I think usually it follows almost immediately, and there isn't an element of 30 to 40 minutes that the man is perfectly well in between. [478]

Q. Well, Doctor, I believe I may have asked you this question before, but you do not know what Mr. Lyons was doing during the period of time you were separated from him, do you?

A. I do not, other than the fact I know he shot two doves, maybe it was three, I don't remember the number, but he shot a few doves.

Q. Doctor, on your direct examination you took

(Testimony of Dr. Homer P. Rush.)

into consideration the negative findings of Dr. McBride's cardiac tests and his E.K.G.'s; as a matter of fact, Doctor, doesn't it quite often happen that an individual is examined to determine if he has a heart condition, say for insurance purposes or just a periodic check-up, and an electrocardiogram is taken, the usual cardiac tests are given, all of which are negative, and then the individual dies shortly thereafter? A. That has happened, yes, sir.

Q. And in such cases after an autopsy is performed, isn't one of the common causes that are revealed is a coronary sclerosis?

A. I think that that would be a correct statement, but I don't know as to how frequently sclerosis will be the only finding, and of course it would depend upon the amount of the arteriosclerosis, and I believe some of these—there you will find that there has been several of them that were only small degrees.

Q. And in some of the cases there is no knowledge of any [479] condition of the heart; isn't that correct? A. Yes, sir.

Q. Now, if that is true, Doctor, you can't rule out the possibility that that couldn't occur in this case?

A. I think that is correct, sir, that you cannot rule it out.

Q. And if Mr. Lyons suffered a heart attack prior to the discharge of a shotgun, you would be sure that was how this affair occurred?

(Testimony of Dr. Homer P. Rush.)

A. Yes, sir, if I knew that, I would feel definitely that that was correct.

Q. And, Doctor, from the autopsy report, you do of your own knowledge know that there was some involvement of the coronary arteries and some involvement of the aortic valve?

A. I think that is correct, there is recorded an anatomical description of it, but I do not know that there was any involvement that would be physiologically significant.

Q. My question is that the autopsy revealed that there was some involvement.

A. Yes, sir, there was some involvement, but still in explanation of it, I don't believe that one can interpret that that functionally was not active.

Q. And you do not have knowledge of your own as to the extent of the involvement, do you?

A. Only from the description.

Q. If that involvement was extreme, say, a 90-per-cent [480] involvement of the caliber of the coronary arteries, then your opinion would be that that condition was the direct cause of his death; would it not?

A. Yes, it would, yes, sir, finding there was that much involved, I would certainly say that.

Q. Then, Doctor, not knowing the extent of the involvement of the coronary arteries and aortic valve, in giving your opinion as to the cause of death, you have sort of weighed in your own mind what the Mexican doctors meant by the use of certain words in their findings; isn't that true?

(Testimony of Dr. Homer P. Rush.)

A. I assumed that the Mexican doctors meant that originally with the description that I thought was present that there was enough involvement to functionally be important. It's been my opinion since having it explained by another Mexican, who has had some knowledge of pathology himself, that it was the same type of findings we would find in many people of that age group that Mr. Lyons was. I just had to change the opinion of what I originally thought that they meant.

The Court: Mr. Kriesien, I don't want to be critical in any way, but I think we are getting into the field of repetition somewhat. Now, I realize it is somewhat unavoidable in a case of this character. However, I think we have progressed through the anatomy of the heart, and we have also had Dr. Chamberlain, and have examined Dr. Rush, so may I respectfully suggest that we get along with this and [481] that you avoid repetition to the extent that you can? I see there are some other doctors waiting. Now, it is not my purpose to tell you how to conduct your case, but I want to get to the bottom of this case just as rapidly as possible and decide it.

Mr. Kriesien: I appreciate that, and I apologize for it. I am leading up to a particular point.

Q. But, Doctor, you were required to speculate upon what they meant by their terminology in the report as to the extent of the diminishment of the caliber of the coronary arteries; were you not?

A. I think that that is a true statement, except I would, again, to explain, would expect anybody

(Testimony of Dr. Homer P. Rush.)

doing a pathology to have stated that there was a distinct decrease, if there had been a very marked diminishment.

Q. Now, you have disagreed with the conclusions of the Mexican doctors. Now, if you had been present in person yourself, you would be in a better position to be definite as to the opinion as to the cause of death; would you not?

A. I believe I would, yes.

Q. What would you have specifically looked for in the autopsy report that you especially thought would be important?

A. I would have been very happy if he had mentioned somewhat the size of the coronaries. I would also have been happy if he had mentioned something about the size of the aortic ring. [482] I believe it is fair to state that they were not men too well experienced in doing autopsies and believe that not having any microscopic facilities, which they have not described at all, and not having any facilities apparently for measurements or weights which have not been described at all, that one would have to assume that it is kind of a report given by an individual with not much experience, and he has used descriptive words that would easily be present on the lining of a blood vessel on anybody at the age of 50.

Q. Well, Doctor, you said that they did not have facilities for weighing, and I call your attention to the fact that they did weigh the amount of bile and the gallbladder and the size.

(Testimony of Dr. Homer P. Rush.)

A. No, well, I don't know that they measured it, I understand 40 ccs. but I didn't realize there was any weights carried out.

Q. Well, Doctor, the two Mexican doctors had the opportunity to observe all of the matters you have just testified to and consider in arriving at their conclusion as to the cause of death; did they not?

A. They had all of the facilities as regards what they saw anatomically, but they didn't have any clinical facilities as to what this man had, and I think that any pathologist that has had a little bit of affairs if he knows the clinical [483] story before he does his autopsy, and I don't believe that had these Mexicans gone over the story previously that they would have arrived at those conclusions.

Q. Now, Doctor, you have been an expert witness in many cases; have you not? A. A few.

Q. By "few," approximately how many, Doctor?

A. I do not have any idea.

Q. Actually, it runs up into a considerable number? A. A number, all right.

Q. And you were aware of the fact, Doctor, that you were to base your opinion on the facts of the case and not upon the opinions of others?

A. That's correct.

Q. Now, Doctor, before you gave your affidavit in this case, did you discuss the case in detail with Mr. Maguire or members of his office?

A. I think probably I gave them the information

(Testimony of Dr. Homer P. Rush.)

that I had from what I saw in this man. I think probably, it was my opinion that was discussed and not any of theirs. I think that I was wrong in making assumptions that I had no right to have made as to taking the conclusions to be well warranted. I think that in most of the autopsies, at least that I have had done by men in Portland, and they are all well trained men, they usually put an anatomical diagnosis listed on the top, [484] and we usually tend to read it, we usually don't read the description.

Q. Doctor, did you discuss the facts and what your medical opinion would be in detail with Mr. Maguire or any member of his firm prior to giving your deposition?

A. No, I don't know in which, if any detail I told them of the affair and the chain of events and that's about all.

Q. And you knew your deposition was to be taken for some period of time?

A. No, I think I knew—I don't recall how long—but I don't believe it was over a matter of 40 hours, I may be wrong, you probably remember that.

Q. Doctor, you have testified on the stand here that at the time you gave your deposition that you had not studied the entire Dr. McBride medical case history file; that you had not examined the Mexican autopsy report in detail; that you had not been advised as to what Dr. McBride's testimony was with reference to the examinations of February 3rd, 4th and 5th, 1953. Now, Doctor, is it your practice to

(Testimony of Dr. Homer P. Rush.)

proceed to give affidavits and give depositions in cases involving \$105,000 under oath as to medical cause of death without examining all of the material that is available to you?

A. I thought that I had the conclusion of the material and that's why I gave the deposition as I gave it. I didn't know what the amount was involved in insurance, I don't [485] know now, nobody has given me any information on it.

Q. But, Doctor, you have testified that you had not examined all of the Dr. McBride file and you had not examined the autopsy report in detail.

A. That's correct.

Q. And you proceeded to give your deposition?

A. Because I thought the conclusions I proceeded to give—in explanation, I thought the conclusions were probably warranted or they would not give them.

Q. And then you started to wonder about your conclusions after you gave your deposition?

A. That's correct, when I began to put two and two together and making six, and I wondered where the other two was.

Mr. Kriesien: That's all.

Redirect Examination

By Mr. Beebe:

Q. Doctor, Mr. Kriesien examined you on direct examination at the time your deposition was taken; did he not? A. I think he did.

(Testimony of Dr. Homer P. Rush.)

Q. And you answered the questions that he asked you?
A. I did.

Q. Now, Doctor, before I go to your deposition, when you were talking about the chest pain that was described in Dr. McBride's record, is this the thing you had in mind: "Has had attack of chest pain yesterday and today, constrictions in chest and radiation down arms. Fluoroscopic and E.K.G. not [486] diagnostic. Sed rate ordered, also W.B.C., and some kind of acid. Nitroglycerin prescribed 1/200 on onset of pain. May need Thaverine. 2/5/53 pain some imp. Advised to go fishing." Is that what you had in mind?

A. Yes, and I note that it was improved and advised to go fishing, because this man was known to have gout and I presumed it was more or less of a constant pain or they would not have mentioned that "pain imp."

Q. Now, referring to your deposition, Doctor, page 24, before that time you had been describing the occurrence on the trip. Did Mr. Kriesien ask you the following questions and you give the following answers?

Mr. Kriesien: If the Court please, I object to this line of cross-examination. I believe that the only proper matter he can inquire on as to the questions and answers given on the deposition must be where I have not incorporated some portion of the answer that was propounded or is necessarily tied up in the chain of questions.

The Court: Overruled.

(Testimony of Dr. Homer P. Rush.)

Q. (By Mr. Beebe): "Question: Doctor, did the Mexican doctors advise you of their specific findings of the autopsy? Answer: Only in regard to what I have told you. They stated that—language difficulties made it a little hard. One of them attempted no English, and the other one was not very good, but the conclusions were, from our conversation with them, [487] that that was what they felt the autopsy had shown, arteriosclerosis of some of the vessels about the heart, with aortic insufficiency and coronary insufficiency and superficial gunshot wound." Did you so testify? A. Yes, I did.

Q. Now then, Doctor, in giving the balance of your testimony in your deposition, did you accept and assume the Mexican autopsy findings of aortic insufficiency and coronary insufficiency?

A. I did.

Q. Now, Doctor, page 26 at the bottom, Mr. Kriesien questioning you about your affidavit: "Question: Doctor, in this affidavit of March 31, 1953, you state, 'From my own observations made at the time of his death which are corroborated by the autopsy report I certify, one, that James A. Lyons had an underlying coronary artery disease.' " Then Mr. Kriesien's question, "Was this a fact that could be observed by you, or was this a fact that was furnished to you by the Mexican doctors? Answer: The fact that was furnished to me by the autopsy that he had coronary disease." Did you give that testimony? A. I did.

(Testimony of Dr. Homer P. Rush.)

Q. And did you make that assumption based upon the conclusions of the autopsy?

A. I did. I think in explanation of that, what one should [488] note, that I made the statement previous to the autopsy that I felt they would find some coronary artery disease or that it would have to be a shock condition, and I attempted to show further on here that it was not gone into at that time, so it could be brought out, I wasn't asked any further to go into it.

Q. Now, Doctor, on page 34, question by Mr. Kriesien, "But going back to these other various findings of the Mexican doctors, are those conditions found in what you would term a normal heart? Answer: You mean what I have described? Question: Yes. Answer: No, they are not. Both coronary insufficiency and aortic insufficiency would be abnormal." In giving that answer, were you referring to the conclusions of coronary insufficiency and aortic insufficiency that they had made?

A. I was, from organic basis.

Q. You were not considering any clinical matter at the time you gave that answer; is that correct?

A. That's correct.

Q. Doctor, referring to page 37, a hypothetical question given you by Mr. Kriesien, "Doctor, on page 4 of your supplemental affidavit of July 10, 1953, you state, 'I learned later that this man had been checked over by Dr. William McBride of Palm Springs a day or two before this trip. He had been assured his general status was good; that he

(Testimony of Dr. Homer P. Rush.)

was [489] tired and probably needed a vacation. It is my medical opinion that this man was in good physical condition the morning of the accident, with no evidence of cardiac strain, nor had he been under any exercise or excitement that would have produced a cardiac strain previous to the explosion of the shotgun which caused the superficial wounds.' Doctor, assume the fact to be that Mr. Lyons on May 12, 1950, after hurrying to answer a phone call was seized with sudden pain in the right and left arms to the extent he could not hold a phone; on February 3, 1953, he had constricting chest pains; on February 4, 1953, he had constriction in the chest and radiation down the arms, was given a prescription of nitroglycerin, still had pain on February 5, 1953, and was advised that he could go on a fishing trip provided he did not do any extensive work such as tramping around fields or heavy lifting; that his condition was diagnosed as a cardiac fatigue due in all probability to excessive emotional stress. Would your opinion have been that Mr. Lyons was in good physical condition on the morning of February 10, 1953, with no evidence of cardiac strain? Answer: It could have been. I knew none of these facts that you are mentioning now, but you are bringing out just some isolated facts and asking me to make an opinion. I would say that anybody that was subject to angina pectoris and suffered—and I assume that is what this man was—by which you say after he hurried [490] to a phone he had pain across his

(Testimony of Dr. Homer P. Rush.)

chest, went down both arms, was constricted in nature, relieved with nitroglycerin, I would feel that he had evidence of coronary insufficiency.”

Doctor, did you assume from the limited hypothetical question that the man had coronary insufficiency if the pain referred to in 1953 was an angina pectoris pain?

A. I wondered about it at the time. I don't believe that I felt that we had proof for it, because of his freedom from pain for three years following, but it was one of the things that I wondered about.

The Court: Now, the reading and the signing of the deposition, that's all been testified to. In addition, I have read the deposition of Dr. Rush. I intend to read the deposition again thoroughly and completely, so may I again caution you to try to avoid repetition. I am not trying to hasten you gentlemen, I realize the difficulties that beset you in the trial of the case. There are sharp conflicts in the testimony, but I urge you to consider the Court's time and your own, even the time of these other gentlemen here that are taking the time to come here and testify, that you do everything in a lawyer-like fashion to expedite this matter. We will take a short recess.

(Whereupon, a short recess was had.)

The Court: Proceed, gentlemen.

Mr. Beebe: Your Honor, I am going to get away from [491] this examination, but I have one more

(Testimony of Dr. Homer P. Rush.)

question I would like to put in connection with the doctor.

Q. (By Mr. Beebe): On page 87 of your deposition at the bottom of the page, was this given to you? “ ‘There was a covering and cementing of the aortical sigmoids with atheromatous deposits, the left auricular-ventricular ring slightly dilated.’ Doctor, what would be meant by aortical sigmoids, assuming that that is the language of an autopsy doctor, an autopsy surgeon, just the two words ‘aortical sigmoids.’ Answer: Aortical sigmoids or valves.” Was that testimony given by you and the question asked and answered?

A. Yes, it was, except that I think we identified the statement was the semilunar valves.

Q. Now, Doctor, was that the pathological description of the aortic valve that you had in mind in giving the testimony in your deposition, that which I just referred to, a covering and cementing?

A. That plus the conclusion of aortic insufficiency. Yes.

Q. Now, Doctor, if an aortical semilunar valve is described as covered and cemented, what kind of a picture does that present to you?

A. Well, to me that would mean that it wasn't a competent valve, that is a valve which would have either aortic insufficiency or aortic stenosis, or both.

Q. So that such a man with such a valve would probably have [492] aortic insufficiency?

A. It would be very probable.

Q. And you made that assumption—did you

(Testimony of Dr. Homer P. Rush.)

make that assumption at the time of your—at the time your deposition was taken?

A. I did, and it is so stated in my deposition that I did.

Q. Now, Doctor, a few moments ago you testified that you interpreted Dr. McBride's records to mean that there was a single pain that lasted for three days. If you were to not make that assumption but to assume that it was an intermittent pain and that it was as otherwise described, would that change the opinions that you have expressed here in this trial?

A. No, it would not without other factors being different.

Q. Now, Doctor, on your deposition, to your recollection were you ever requested to give an opinion based upon your observations of the man or his clinical record, other than is given in the hypothetical question that Mr. Kriesien asked?

A. I was asked to when I made the affidavit out.

Q. No, I mean at the time of your deposition were you asked to take into any consideration the clinical record of Mr. Lyons as it has been presented to you in the trial of this case?

A. No, I had—I don't know quite what you're driving at, Mr. Beebe; I had seen the electrocardiogram, I understood that he had normal physical examinations, and I had seen the death certificate of the Mexican doctors which stated aortic [493] insufficiency and coronary insufficiency and I had been over the translation, which I believe it was Mr. Wilson's, about the part concerning the heart that

(Testimony of Dr. Homer P. Rush.)

seemed to be confusing, and that's where I first got the idea about cementing and covering as mentioned here, because that was before—I believe Mr. Wilson's autopsy was transcribed, or translating of the autopsy, I am sorry.

Q. Now, Doctor, if the post-mortem examination does not show the extent to which there is a diminishment of the coronary arteries is it then important to examine the history of the man as to what he did, the kind of exertion he could perform and as to whether under exertion he had pain or any other symptoms or signs of heart disease?

A. Yes, I feel that that would be exceedingly important. In fact, the physical history is important, is of more importance, or at least can be much more important than the physical findings.

Q. Now, Doctor, with respect to the pain of angina pectoris, is it common to find a situation in which an angina pectoris pain will come and then won't appear for some years?

A. No, I don't believe that to be very common.

Q. Have you ever heard of such a case?

A. No, I have never seen such a case.

Mr. Beebe: That's all.

Mr. Kriesien: No further questions, your [494]
Honor.

The Court: All right, you may be excused, Doctor.

The Witness: Thank you.

(Witness excused.)

Mr. Beebe: If your Honor please, the plaintiff had intended to rest at this time. However, one or two things that I believe should be cleared up, I should like to call Mr. Maguire for a short examination and then later we should like to recall Dr. Christen, the Mexican doctor, and Dr. Lehman for a few questions, it will be very brief.

The Court: Very well.

Mr. Beebe: Take the stand, please.

The Court: The record may note that Mr. Maguire has already been sworn.

ROBERT F. MAGUIRE

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Further Direct Examination

By Mr. Beebe:

Q. Mr. Maguire, referring to the time approximately the evening or two evenings before Dr. Rush's deposition was taken, do you recall the meeting with Dr. Rush at which time a translation of Mrs. Del Paso of the Mexican autopsy was at hand and the bringing in of Mr. Wilson to attempt to make a further or different or more complete translation? [496] A. I do.

Q. Will you tell the Court the circumstances surrounding that?

A. Well, some time before that we were informed by Mr. Kriesien that Mrs. Del Paso's—who was, I think, the wife of the Mexican vice-consul

(Testimony of Robert F. Maguire.)

here—translation was inaccurate and had omitted either a line or perhaps two lines, and we searched around to try to find out if we could get Mrs. Del Paso and we found out she was living in Portland, and we couldn't locate her. We later found she was up in Seattle, and I talked—well, I made some effort—I don't want to be too strict on this, I want to point out I tried to get a hold of her through the head of the Immigration Service here, and asked him if he knew of anyone that knew Spanish, and he gave us Mr. Wilson's name as being in their office staff and he did know Spanish. We asked—my recollection would be the afternoon before Dr. Rush's testimony deposition was being taken we got Mr. Wilson—he came up to Dr. Rush's office, you were there and I was there and Dr. Rush was there and we asked him to take—and this was with particular emphasis upon the autopsy findings and asked him to give us first a literal translation with no particular attempt to put it into American expressions. He took it—I followed his translation with Mrs. Del Paso's and then I had him take it again and I took shorthand notes of his [497] translation and after that was done, then we called in—we didn't call in we used a dictating machine and I dictated, and that is the matter that you had when your deposition was taken, which you have in front of you now.

Q. Was the transcript of those notes of yours from Mr. Wilson's translation then transcribed?

A. That's right, I dictated what he said and had

(Testimony of Robert F. Maguire.)

him correct it as we went along. There were three corrections; and put them on the machine and that was transcribed either that afternoon or the next morning—I can't be positive about it—by Dr. Rush's secretary.

Q. What document was it that I used when I asked Dr. Rush about the specific findings?

A. You used either that one or a copy of it.

Q. Well, you are now referring to the——

A. That you just handed to the Clerk.

Q. I will ask you, Mr. Maguire, is that the transcript of the Dictaphone belt of the translation that you just described to the Court?

A. That is—I should say that one or two places I asked a question about the meaning of the particular term and those appear and the answers appear within the parentheses you will find here.

Mr. Kriesien: If the Court please, I object to the introduction of the document on the ground and for the reason [498] that it's absolutely irrelevant and immaterial to the proceedings. The questions propounded to the witness appear in the document itself.

The Court: Overruled. I will receive it in evidence with the observation that the decision of this case is going to turn upon sterner stuff than a translation of English into Spanish and upon Spanish into English.

(Document previously marked Plaintiff's Exhibit 43 for identification was thereupon received.)

(Testimony of Robert F. Maguire.)

Q. (By Mr. Beebe): Now, then, Mr. Maguire, there is in evidence here a translation which has been stipulated that Mr. Wilson prepared. Was that prepared later by Mr. Wilson than that document?

A. That is correct, sir, he took the Spanish—he took a photostatic copy of the Spanish document away with him and then some days later he brought the Dictaphone belts down into our office and those were transcribed there, and he thereupon reviewed that and that is the one I think which is attached to the Exhibit either 7 or 8, I forget which.

Q. Now, then, Mr. Maguire, when was the first time that you met Dr. Christen, who was a witness and whose translation was introduced in evidence?

A. Well, it was a couple of days before Thanksgiving, I would think it was on Monday night, but I am not sure. [499]

Q. To refresh your memory, was it the night before the commencement of this trial?

A. Yes, the night before the commencement of this trial.

Q. And the trial, I believe it is agreed, commenced on the 22nd?

A. Well, it would be the 21st.

Q. What was the occasion by which you met Dr. Christen

A. Dr. Lehman, you and I, Dr. Rush were consulting, going over this case and the matter, and there was a question came up as to whether the Spanish medical terms, or what the meaning of the medical terms or descriptions in the Spanish were,

(Testimony of Robert F. Maguire.)

and Dr. Lehman said that he had Dr. Christen, he was a student in pathology or associate of pathology, with them at the hospital, so we sent for him and he came down and went over it with us and gave in substance what he has testified to, your Honor, in fact of the matter, he typed it out when he got it and the next morning brought it back.

Q. Typed it the next morning and that is the one that is in evidence? A. Yes.

Cross-Examination

By Mr. Kriesien:

Q. Mr. Maguire, did you ever advise me or our office that the translation used by Mr. Beebe in examining Dr. Rush was in error? [500]

A. No, I don't think I did, I don't remember it at least.

Mr. Kriesien: That's all.

The Witness: There was no occasion for it that I know of, for the reason that when Mr. Wilson gave us this translation, the words "covered and cemented," were not there and he gave a more accurate one.

Mr. Beebe: That's all, Mr. Maguire.

The Court: Next witness.

Mr. Beebe: May the Court please, the other two witnesses are not here. We had anticipated that the finishing with Dr. Rush would take longer. May we suggest that we take our noon recess now and come

back a little earlier perhaps in order to not lose time?

The Court: Back at 1:30.

Mr. Beebe: Yes. The Court will be in recess?

The Court: The Court will be in recess until 1:30.

(Whereupon, a recess was taken until 1:30 o'clock p.m. of the same day.)

The Court: Proceed.

Mr. Beebe: If your Honor please, the plaintiff would like to recall Dr. Jose Christen for about four questions.

The Court: Very well. [501]

DR. JOSE J. CHRISTEN

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Redirect Examination

By Mr. Beebe:

Q. If I may approach the witness, your Honor, it might make this much shorter.

The Court: Yes.

Q. (By Mr. Beebe): Dr. Christen, I hand you Plaintiff's Exhibit Number 12 in evidence, refer you to what has been marked 4-A thereof and beginning with the word "ventriculo," right here (indicating), will you translate that down through "ateromatoses"?

Mr. Kriesien: If the Court please, that has already been translated.

(Testimony of Dr. Jose J. Christen.)

The Court: Better translate it again.

Mr. Beebe: All right.

The Witness: It says, "The left ventricle was slightly hypertrophied, there was"—it doesn't tell "there was," but it should be—"under thickening and hardening of the aortic sigmoids which are the semicircular valves with atheromatous deposits. The left auricular ventricular ring, which is the mitral valve was slightly dilated. The coronary arteries were dissected in which they were found diminished in caliber with atheromatous plaques." [502]

Q. (By Mr. Beebe): Now, Doctor, what is the Spanish word for "covering"?

A. C-u-b-i-e-r-t-o (spelling), for the man, or "a" is the feminine.

Q. Now Doctor, does that word or any word of which it is a root appear in the sentence you have just translated? A. No.

Q. Doctor, what is the Spanish for "cemented"?

A. Cementado.

Q. Will you spell it?

A. It's just like cement, it ends in a-d-o (spelling), or a-d-a (spelling).

Q. Doctor, does that word or any word of which it is a root appear in the sentence that you just translated? A. No.

Q. Doctor, what is the Spanish word for "stiffened"? A. Stiffened?

Q. Yes. A. Entasidao.

Q. Will you spell that, please?

A. E-n-t-a-s-i-d-a-o (spelling).

(Testimony of Dr. Jose J. Christen.)

Q. Does that word or any word of which it is a root appear in the sentence you have just translated? A. No.

Q. What was your answer? [503] A. No.

Mr. Beebe: You may inquire.

Mr. Kriesien: No questions, your Honor.

Mr. Beebe: That's all.

The Court: You may step down.

(Witness excused.)

Mr. Beebe: If your Honor please, I understand from counsel that it is stipulated that in the event that the Court finds in favor of the plaintiff here, he may fix an attorney's fee under the Oregon Statute with or without the introduction of any testimony thereon as the Court wishes.

Mr. Kriesien: It has been already so stipulated. It is again stipulated.

The Court: If I determine that the plaintiff is entitled to prevail, then I will either hear testimony or I will receive it by the form of an affidavit to the amount of work you have performed in a thing of this kind.

Mr. Beebe: With that then the plaintiff rests.

Mr. Kriesien: If the Court please, before calling our first witness, we would like to have marked for the purpose of identification the original certified copy of the death certificate and the translation attached thereto.

The Court: Very well.

(Document was thereupon marked Defendant's Exhibit 44 for identification.) [504]

Mr. Beebe: No objection, your Honor.

Mr. Kriesien: Mr. Beebe, I notice that the translation is prepared by John W. Wilson and his certification is not signed. Is it stipulated that this is his translation?

Mr. Beebe: If he had an opportunity, he would have certified to it or testified to it.

Mr. Kriesien: We now offer the original death certificate and translation.

The Court: They will be received.

(Document previously marked Defendant's Exhibit 44 for identification was thereupon received.)

Mr. Kriesien: The defendant will call Dr. Hunter. [505]

DR. WARREN C. HUNTER

was thereupon produced as a witness on behalf of the defendant herein and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kriesien:

Q. Will you state your full name, please?

A. Warren C. Hunter.

Q. And you are a doctor? A. Yes.

Q. Where do you reside? A. In Portland.

Q. What is your profession?

(Testimony of Dr. Warren C. Hunter.)

A. I am a physician and surgeon specializing in the field of pathology.

Q. And you are duly licensed? A. Yes.

Q. What was your pre-medical education, Doctor?

A. I attended what was then Albany College prior to the war, first world war. Oregon State College for one quarter in the spring of 1919 and then I was in medical school the fall of 1919.

Q. And what was your medical education?

A. All of it was obtained here at the University of Oregon Medical School. I took five years to go through because I went in the Department of Pathology as student-assistant after [506] having completed the first two years and thereafter became the clinical director. I graduated in 1924.

Q. Since your graduation, did you undertake postgraduate work or internships?

A. Yes, I had a year's internship in Multnomah County Hospital and then I went into the Department of Pathology for a matter of about nine months while I was waiting for an appointment as a fellow in medicine of the National Research Council and from March—oh, about the end of March until about the first of April of '26 to '27 I was a fellow in pathology in the University of Michigan and while there, I was granted the additional degree of master of arts in pathology for some work I did.

Q. Doctor, have you had occasion to write any theses or articles with reference to your specialty and in particular the heart?

(Testimony of Dr. Warren C. Hunter.)

A. Yes, I have written about something over 50 papers, I guess, all told.

Q. Doctor, are you instructing academically in any schools at the present time?

A. Yes, I am the head of the Department of Pathology at the University of Oregon Medical School.

Q. And how long have you been head of the department?

A. Since 1944.

Q. And were you associated with that department prior to [507] becoming the head of that department?

A. Yes, I have always been associated with the department.

Q. For approximately how many years is that, Doctor?

A. Well, it would 30 years.

Q. Doctor, in the practice of your specialty or otherwise, do you have occasion to perform autopsies?

A. Yes, I do.

Q. And what are the occasions that require you to perform an autopsy?

A. Well, the performance of an autopsy is one of the duties that falls to a physician who is in the field of pathology, or at least anatomical pathology, and if one has a connection with a medical school hospital or with a private hospital or in any other category as, for example, performs autopsies for the coroner of a county, then it is within our realm and our training and our province to perform autopsies.

Q. Do I understand that you perform autopsies for the County Coroner of Multnomah County?

(Testimony of Dr. Warren C. Hunter.)

A. Yes, I have had that connection ever since I graduated.

Q. That's been a good many years, Doctor?

A. About 31, something like that.

Q. And are there any other departments of the City or other forms of government that you perform autopsies for?

A. Well, for Multnomah County Hospital which is one of the teaching hospitals in the medical school. [508]

Q. Do you do such work in conjunction with the Oregon Hospital, I believe that is connected with the school?

A. Well, that's what I meant, the Multnomah County Hospital is one of the teaching hospitals of the medical school.

Q. Doctor, in the capacity of your profession, are you called upon to examine autopsies performed by others and render an opinion as to the cause of death?

A. Yes, that happens occasionally.

Q. Now, Doctor, at our request, you have examined Plaintiff's Exhibit 13, which is a translation of a Mexican autopsy report by Mr. Charles Wilson and Plaintiff's Exhibit 15 which is a translation of the Mexican autopsy report by Dr. Christen, and you are familiar with their contents, are you not?

A. Yes, I think so.

Q. I would like to ask that the Bailiff hand the doctor both Plaintiff's Exhibits 13 and 15.

Mr. Beebe: Here is 15, Mr. Crier.

(Testimony of Dr. Warren C. Hunter.)

Q. (By Mr. Kriesien): Now, Doctor, I am going to ask you a hypothetical question which will be rather long and will incorporate in that question almost all of the report or translation of the autopsy report by Dr. Christen, and I will ask you to assume the following facts: On February 10, 1953, Mr. Lyons was 49 years of age. He had been in the logging and lumbering business most of his adult life actively participating in the woods operations of his company. He [509] was a dynamic, energetic, successful business executive who drove himself mentally and physically. He was one who kept his physical complaints to himself and was an experienced hunter, familiar with the handling of shotguns. That on or about January 15, 1950, Mr. Lyons was involved in an automobile accident in which he suffered multiple contusions, abrasions, fractured nasal septum, fractured ribs, and he thereafter developed traumatic pleuritis, hemothorax, and gout. That he left the care of his physician at Palm springs on May 6, 1950, to return to Coos Bay. On May 12, 1950, after hurrying across a lumber dock he was seized with constricting chest pains and with pain radiating down the arms to the extent he could not hold a phone; that at that time an E.K.G. was taken and the usual cardiac tests but no objective findings of a heart condition were reported; he was advised he had to slow down.

Shortly before February 3, 1953, he had been on

(Testimony of Dr. Warren C. Hunter.)

an extended trip to the East Coast which involved considerable responsibility and the exertion of mental and physical effort. On returning to Palm Springs and during the night of February 3, 1953, he had constricting chest pains and pain radiating down both arms. On February 4, 1953, he went to a doctor complaining of constricting chest and arm radiation pain. An E.K.G. was taken and the usual cardiac tests performed, but no objective findings of the heart were reported. However, [510] the doctor prescribed nitroglycerin and his medical case history file states that he may need Thaverine. On February 5, 1953, the pain was some improved and he was advised he could go on a fishing trip if he did not do any excessive work such as tramping around fields or any heavy lifting, that he would also be with two outstanding cardiologists on the Pacific Coast, Dr. Homer Rush and Dr. Francis Chamberlain, and if anything unusual transpired he would be in good hands; that he was to take the nitroglycerin on the onset of pain.

On February 9, 1953, he played a large marlin fish for 30 minutes without exhibiting any evidence of cardiac strain or shortness of breath. On February 10, 1953, he arose early, had breakfast, walked at least one-half mile through soft sand and up sand dunes 80 to 100 feet in elevation without evidencing cardiac strain or shortness of breath; that he separated from his hunting companions, one of which heard a discharge of the shotgun followed very shortly by another shotgun shot and approxi-

(Testimony of Dr. Warren C. Hunter.)

mately 12 seconds later that hunting companion heard stertorous breathing; 30 to 60 seconds later he was found cyanotic, pulseless and unconscious. He was rolled over in a period of 20 to 30 seconds and pulmonary edema developed in four or five seconds, the stertorous breathing stopped, artificial respiration was given and he expired in a matter of two to five minutes from the time of finding him under the bush. [511]

Doctor, assume further that an autopsy was performed by the two doctors that evening and their autopsy report incorporated the following findings. I might state that this is now from Dr. Christen's translation, being Exhibit 15. The tongue was bitten by the teeth. Transverse skin folds on the frontal region, anterior aspect of the neck and posterior aspect of the neck. Blood crusts on the right and left side of the face. They were more abundant in the first mentioned side. When these were lifted powder dust was found to be encrusted in the palpebral temporal regions and on the ear lobe of the right side. Skin scratches of rounded and linear shape were present in irregular distribution on the rest of the face. There is a circular shaped orifice with inverted margins of an approximate diameter of one millimeter in the frontal region, right half, at the site of the hairline. Skin scratches were found on the neck which became evident when the blood crusts on them were lifted; the limits and distribution of these scratches were irregular, but they were more precise than the ones on the face;

(Testimony of Dr. Warren C. Hunter.)

they vary from half to one millimeter in length, approximately. Scratches on the external aspect of the arm, lower third, elbow, external and posterior aspects of the forearm and dorsal aspect of the right hand. Skull, shape and volume were normal, when the scalp was detached it was noticed that the orifice present in the right frontal region did not reach [512] the bone in depth and that its contours were lost in the fat tissue. Skull articulations were normal; superior sinus had blackish liquid blood in small amount; the brain tissue was somewhat softened. Basilar vertebral arteries, cerebral arteries, and the Willis circle were found to have no alterations. The neurovascular bundles of the neck were dissected and no alterations were found. Thorax. When the sternum and rib cartilages were lifted the chondro costal joints were found to be ossified. There were pleural parietal adhesions of strong type in the posterior aspect of the sternum and the left thoracic cavity. The right lung was found to be free. Both lungs were found to be congested. On cut section, black liquid blood seeped out. The superior and inferior left lung lobes were fused together. The pericardium was found to be thickened and it had strong adhesions to the diaphragm. The heart was surrounded by a dense coat of fat tissue. The left ventricle was slightly hypertrophied, the semicircular valves of the aorta were thickened and hardened with atheromatous deposits, mitral valve was slightly dilated. The coronary arteries were dissected and they were

(Testimony of Dr. Warren C. Hunter.)

found to have a diminishment in their caliber due to the presence of atheromatous plaques. Abdomen. The liver was very enlarged in weight and volume. It was of dark red color that on cut section presented slight resistance. The gallbladder was filled with a dark green bile in quantities approximating 40 ccs. [513] and also contained two gallstones, one of one centimeter in diameter located in the union of the cystic canal with the common bile duct and also a smaller one about three millimeters in diameter at the bottom of the gallbladder—both were free.

Now, Doctor, assuming those facts, do you have an opinion as to the medical cause of Mr. Lyons' death? A. Yes, I do.

Q. And what is that opinion?

A. In my opinion with these facts as read, I would feel that Mr. Lyons died as a result of coronary artery insufficiency.

Q. Doctor, you say the facts that have been read. What are the factors that you have taken into consideration at arriving at that opinion?

A. The factors are these, based upon his history of an attack in 1950, I believe at which time he crossed a dock rapidly and had pain in the arm and was unable to hold a telephone; based further upon the clinical information that shortly before he went on the fishing trip and while at Palm Springs according to the doctor's statement he again sustained attacks of pain in the left arm and

(Testimony of Dr. Warren C. Hunter.)

a constricting feeling of pain in the chest; that the physician furnished him with nitroglycerin and told him to take it if he needed it for pain and gave him specific instructions not to exert himself unduly; [514] based further upon the fact that on the morning of his death he walked an appreciable distance through sand and up sand dunes to the height of what was said to be 100 feet and was then found in a dying condition with death ensuing very shortly afterwards, and then in the face of the autopsy findings in which it is stated that the coronary arteries were the seat of atheromatous—no, they were found to be diminished in caliber due to the presence of atheromatous plaques; based upon all of those features, it would be my opinion that his death was attributable to coronary artery insufficiency.

Q. And, Doctor, assuming those facts, do you have a medical opinion as to the most probable precipitating cause of coronary insufficiency?

A. I think so.

Q. And what is that opinion, doctor?

A. The physical exertion occasioned by walking something in the order of a half mile in sand up to elevations of 100 feet would, in my opinion, be sufficient to bring on this attack of coronary insufficiency from which he died.

Q. Doctor, is the finding that the left ventricle was slightly hypertrophied of any medical significance to you assuming the fact to be that Mr. Lyons did not have high blood pressure?

(Testimony of Dr. Warren C. Hunter.)

A. Well, we have but one thing in the autopsy findings that would possibly explain this hypertrophy, and that is the [515] description of alterations in the left—in the mitral valve—I mean of the aortic valve which would be interpreted as aortic valve narrowing or stenosis.

Q. Doctor, from the findings of the autopsy report alone, do you have an opinion as to whether Mr. Lyons' condition was such that an outside factor was required to precipitate a ventricular fibrillation and death? A. Yes.

Q. And what is that opinion?

A. Not of necessity based on my own experience.

Q. When you say "based on your own experience," what is the basis of that opinion, Doctor?

A. Well, that is the many years of experience that I have had in connection with performance of autopsies for the coroner of this county and it would amount up to in the thousands for over a period of many years; we encounter many examples of sudden death in which the findings are very similar as far as the coronary arteries are concerned to what they were in Mr. Lyons and in which the complete autopsy and toxicological examination have failed to disclose anything else that would explain the death, and the circumstances under which those deaths occur are extremely varied. They may be found dead in bed; they may be walking; they may be playing a game of cards, for example, or exercising; extremely varied conditions, so for that reason I cannot believe that

(Testimony of Dr. Warren C. Hunter.)

it [516] is also necessary that some definite physical strain or shock of any kind need of necessity bring on the coronary insufficiency.

Q. Doctor, I will ask you whether or not it is a fact in these numerous autopsies that you have performed that you have had occasions of individuals dying a heart death with no evidence of any involvement of the heart itself?

A. Well, from the clinical evidence, sometimes it seems so, that they do. We are not always able to find pathological features that will satisfactorily explain the death.

Q. Doctor, do you have an opinion as to whether the injuries sustained by Mr. Lyons as described to you from the autopsy report could, solely and independently of all other causes, occasion his death?

A. Yes.

Q. And what is that opinion, Doctor?

A. I don't think so.

Q. Doctor, from your experience and in the practice of your specialty, do you have an opinion as to whether an emotional upset such as the discharge of a shotgun in close proximity to the face; the infliction of injuries as described in the autopsy report to the neck and face could be a probable precipitating cause of death of a person with a normal heart?

A. Well, the crux of that—

Q. Do you have an opinion? [517]

A. Yes.

Q. And what is that opinion, Doctor?

A. The crux of the situation, I think, are the words "a person with a normal heart." If the

(Testimony of Dr. Warren C. Hunter.)

heart was normal, I would say no. I do not think it would.

Q. Doctor, medically speaking, is the narrowing of the coronary arteries from atheromatous deposits considered a disease of the arteries?

A. Definitely, yes.

Q. Doctor, and medically speaking, do normal arteries have atheromatous deposits?

A. They do not.

Q. Doctor, at our request, you examined Exhibits 13 and 15, being the two translations of the Mexican autopsy report and I will ask you whether or not there is any change of any medical finding of a material fact between the two translations.

Mr. Maguire: May I hear that question read again? Would you please read it to me, Mr. Reporter?

(Question read.)

Mr. Maguire: I will object to that question on the ground that it is a conclusion.

The Court: He objected to it on the ground that it is a conclusion and I overrule the objection.

The Witness: No, I have not found any material differences. [518]

Q. (By Mr. Kriesien): Doctor, I will ask you whether or not if in lieu of the wording of the aortic sigmoids being thickened and hardened that they were translated to read there was a covering and cementing of the aortical sigmoids with atheromatous deposits, would that change of translation

(Testimony of Dr. Warren C. Hunter.)

effect your opinion as to the existence of an aortic valve involvement? A. No, it would not.

Mr. Kriesien: That is all, your Honor.

Cross-Examination

By Mr. Maguire:

Q. You say it does not change your opinion as to whether there was an aortic valve involvement; is that what I understood you to say?

A. Yes, that's correct.

Q. What do you mean by aortic valve involvement?

A. Well, it could mean many things, to put it as simply as possible, it would mean that the aortic valve of the heart was examined and found to have something abnormal in it. In other words, the word involvement would mean—would imply that there was something abnormal. It would require elucidation as to what it might be.

Q. You don't know what it might be?

A. I beg your pardon?

Q. You do not know what it was?

A. Other than what is written here, no. [519]

Q. But from what you read, do you know what it was or do you have an opinion?

A. Yes, I think I know something of it, because it tells which leaflets were involved of what valve and it does say that they were hardened and stiffened with atheromatous deposits. Taking that as described and the one who wrote this would in-

(Testimony of Dr. Warren C. Hunter.)

dicating that this involvement of aortic valve was by these atheromatous deposits which produced thickening, and which also in the opinion of the stater hardened.

Q. Go ahead, sir, he says two things about the thickened and hardened and then states what did it was atheromatous deposits. You would make no distinction whatsoever between a valve which was thickened and the amount of the thickening not disclosed, or hardened and the amount of hardness not disclosed and an aortic valve which was covered and cemented, no distinction at all?

A. You haven't stated the whole thing, if I heard the translation correctly, and I was sitting in the back, and this room doesn't have the best acoustics, and if I understood the translation correctly, I thought it said thickened and cemented, by again, atheromatous deposits or plaques. Now, did I state that correctly or did I——

Q. You have it before you, covered and cemented——

Mr. Kriesien: Mr. Maguire, it is not before the witness.

The Witness: No, I don't have that—these two translations [520] do not. I heard the previous witness state it as best as I could hear, that is what I thought he said and I thought he said thickened and cemented by atheromatous deposits or something of that sort. I strained my ears.

Mr. Maguire: I am not criticizing you, we will get it. I think it's 43.

(Testimony of Dr. Warren C. Hunter.)

The Court: Could it have been 44? I have 44.

Mr. Maguire: Thank you very much. The language was, there was a covering and cementing of the aortical sigmoids with atheromatous deposits.

The Witness: Yes. Then I did hear correctly. I think that last, the last few words are the all important thing because they state what, in the opinion of the observer, caused this thickening and cementing, covering and cementing.

Q. (By Mr. Maguire): And you took that into consideration, the testimony that you have been getting here this afternoon, isn't that right?

A. Yes, I did.

Q. And what particular significance do you give the fact that they used the words covering and cementing of the aortical sigmoid with atheromatous deposits, what particular significance do you give to that?

A. I would have to talk to the one that made it, I would have to have further explanation from the one who wrote the words, I am frankly—I would put an interpretation upon it, but it might not be the writer's interpretation at all, you [521] see. The wording is a peculiar wording which I don't think any pathologist would use.

Q. But would that mean the cusps or leaflets do not have free movement because they are cemented together?

A. It could mean that, but I don't know whether it does or not. He should have so stated if there was anything of the kind.

(Testimony of Dr. Warren C. Hunter.)

Q. That would be quite a different situation than merely having some thickening and some hardening, wouldn't it?

A. It could, but the one who makes such a statement is remiss in his scientific observations if he doesn't give more than just those few words. He leaves any reader, and particularly any medical reader, with a feeling of, I don't know what he means, I'd like to know more.

Q. Well, if he simply said that the semilunar valves were thickened without telling you how much, or that they were hardened without telling you how much they were hardened, that still leaves you in a position where you could not state whether they were functioning valves within reasonable limits; isn't that true?

A. Yes, that's right, it requires—for any of those statements—it requires more exact wording than it contained in this report.

Q. Doctor, you wouldn't want to say that a man who had some thickening and some hardening of the valves doesn't have a [522] heart that works in a normal manner?

A. I don't think I quite get your statement.

Q. You would not want to express the opinion that because a man had some thickening and some hardening, without any specification as to how much of either, doesn't have an aortic valve that would go on in a workmanlike manner and permit him to carry on the ordinary functions and activities of life, would you?

(Testimony of Dr. Warren C. Hunter.)

A. Yes, I would want to know more than just that, but the question is getting off to something else. There is another part of the anatomy than the heart, or is more important than his aortic valve, however, which hasn't been touched upon.

Q. Well, I will have to leave that to his counsel. I am just asking you about what you testified. Now, as you say, is there anything in that autopsy which states to what degree, extent, percentage or what not of the coronary arteries to which they were diminished? A. Unfortunately they do not.

Q. Do changes take place, natural changes in the human body as the years go along, as a rule?

A. Oh, of course.

Q. Bones are more brittle? One's bones become more brittle as they get along in years?

A. Oh, I think everybody grants that.

Q. And that's not a disease, is it; or is that just a process [523] of life?

A. That's a hard one to put, I think you could look upon it as a process of life.

Q. Although they're very different than the type of bones one has when they are young, I mean so far as elasticity or brittleness are concerned?

A. Yes.

Q. As life goes on, do the muscles maintain the same tone as they do in youth, do they?

A. Well, they're supposed not to anyway.

Q. Well, you don't object to that, do you?

A. Not personally, no.

(Testimony of Dr. Warren C. Hunter.)

Q. I mean you don't object to that theory or that statement?

A. Not if you go far enough with it.

Q. Do the eyes and the lenses of the eyes tend to change their characteristics as one grows older?

A. So far as vision itself is concerned or just exactly where you happen to focus certainly occurs, or are likely to.

Q. And then they are different than what is the perfect eye of youth?

A. They still may be perfect enough for a person's age.

Q. I notice you wear glasses, and counsel wears glasses, I don't know whether his honor is relieved from that necessity.

The Court: Oh, I can't read the telephone book any more, I know that. [524]

Q. (By Mr. Maguire): That's because the type is getting smaller, your Honor, that is the natural process of life; isn't it?

A. Oh, it's properly supposed to, you have to draw the line somewhere along the way, and I don't know just exactly where the distinction does begin, really.

Q. Do the reflexes, the nervous reflexes remain the same, have the degree of responsiveness as people grow older as performed by young manhood or womanhood?

A. Well, it varies from person to person.

Q. But as a rule?

(Testimony of Dr. Warren C. Hunter.)

A. In general, I think one slows down in reflexes.

Q. Do the walls of the arteries maintain the same degree of tone and elasticity as people grow older as they were when they were in the days of their youth? A. No, they do not.

Q. What causes them to not maintain that same degree of elasticity and tone?

A. If you're speaking of arteries now, I would say it's two things. It would depend upon whether you mean the aorta, which has a great deal of elastic tissue in it or whether you are speaking of arteries that have a good deal of muscle in them. In either event, with aging, elastic tissue commonly does weaken and fragment, to some extent disappears.

Q. What takes its place? [525]

A. Muscle in artery walls under normal circumstances may show a decrease in the size of the actual cells, that which we call atrophy. Now, that's as far as it goes, however.

Q. That's as far as what goes?

A. As far as aging process goes. Now, if you are going on to the atheromatous deposits, that is a disease, and by no stretch of the imagination can it be called an aging process.

Q. Well, let me ask you this: Is it not true that generally speaking, people as they grow older have, or tend to have a form of atheromatous—if that's the proper pronunciation—plaques in their arteries?

(Testimony of Dr. Warren C. Hunter.)

A. Yes, and yet it is—if you say generally true, I will agree with you. If you mean any more than that, as universally true, I would have to disagree with you because it does not always obtain, neither is the matter of age of the utmost importance either, because it has been found in the Korean war, for example, that among young men who were killed in battle or who died as a result of disease, a surprising number of those men had disease of the arteries called atherosclerosis. So the idea that it is something related to aging definitely as a cause and affect relationship, that it is an aging process I think is totally erroneous. I believe it is a matter that is due to a disease. It is a disease, it is a manifestation of disease, and not a matter of [526] aging.

Q. Do you know what causes them?

A. No, I do not know, I wish I did.

Q. As a matter of fact, medical science has not yet determined the cause of those, has it?

A. Yes, I think we are getting fairly close to it.

Q. Well, that's again what you are trying to learn?

A. No, I think we already see quite a bit of light as to the causation.

Q. Do you know what causes it of your own knowledge?

A. No, it takes instruments of precision, like electronic microscopes, which I know nothing about the personal use of, and don't have and I have to

(Testimony of Dr. Warren C. Hunter.)

take my knowledge of that from reading medical literature.

Q. Is it of any aid in diagnosing the condition of a patient to have had an opportunity to have observed him? A. I missed one word.

Q. I said, is it of any aid in diagnosing the condition of a patient that one had had an opportunity to observe him. Assume that one is a qualified observer, of course.

A. Oh, I think undoubtedly it helps, or may help.

Q. Is it of any aid in coming to a direct diagnosis that one should have had an opportunity to give tests and observe the patient and treat the patient over a period of time?

A. No, not of necessity. I still think the opportunity of knowing more about the patient would be greater if one was [527] a competent observer and did observe, but there are some things we don't have to have it for.

Q. I take it, if you had an X-ray of a limb that had a broken bone, you could tell just as well from that that the bone was broken as if you had the man right in front of you?

A. Yes, you can also tell about a coronary artery, what condition they are when you cut through them on an autopsy.

Q. Is it possible for anyone to have—withdraw that question. What is the general diameter of the coronary arteries?

(Testimony of Dr. Warren C. Hunter.)

A. I take that—take it you mean the inside diameter?

Q. Oh, yes, the lumen.

A. And of course you'd have to state which artery you are talking about, at one point, the statement is too broad. It depends on whether you take a main vessel and what it is at its beginning and what it is farther on down.

Q. What part of the coronary artery or arteries does the autopsy reveal was narrowed?

A. It doesn't say. It says the coronary artery, by which I would assume that the examiner knew that there was a right and left coronary artery, and he knows that there are two branches of the coronary artery, and that he examined them all. That's the inference.

Q. Did the autopsy show?

A. No, it did not. I wish he had said. Now, this diameter you are talking about, of course, is an extremely variable thing, depending upon what particular part of artery you are [528] referring to.

Q. It would be larger there at its source than it would be at the end; I assume we can assume that, couldn't we, Doctor?

A. Like a tree and its limbs, they grow progressively smaller.

Q. You wouldn't want to say that the slightest degree or a slight degree of narrowing would, of the coronary arteries, cause a coronary insufficiency, would you?

(Testimony of Dr. Warren C. Hunter.)

A. No, I would have difficulty believing that if it were a slight thing it could cause insufficiency and providing of course that it was in one place. If there was a lot of it in all the arteries and was slight, that would be a different matter, yes.

Q. Now, by the way are you a cardiologist, Doctor?

A. No, I am not. I am a cardiac pathologist.

Q. I beg your pardon, sir?

A. As a pathologist, I certainly have had a long and intense interest in the heart.

Q. Oh, yes.

A. I am not a clinical cardiologist, no.

Q. I don't mean that question in any spirit of criticism, either, Doctor. In dissecting a coronary artery where there are any atheromatous plaques, you can measure the amount of narrowing; can you not?

A. Yes, it could be done, it could be [529] measured.

Q. And then if it wasn't done it could be told just by looking at it to be 10 per cent; 25 per cent; 50 per cent; 75 per cent narrowed by atheromatous plaques, couldn't it?

A. You can, but you should—you ought to measure it.

Q. Well, it could be done, couldn't it?

A. If you're scientific about it, you would measure it.

Q. Well, in other words, there is nothing impossible or impracticable about that to determine

(Testimony of Dr. Warren C. Hunter.)

how much an area at any particular point has been narrowed by atheromatous deposits?

A. No, it can be done, providing you go about it in the right way, which is to cut across the vein and you take the cross section of the vein, and not to take a scissors and open it up and ruin it that way, then you can't tell.

Q. Can you tell from this report that they did not do that?

A. No, I don't know what they meant by the word "dissected," there, they leave it wide open to any interpretation, it could be—could mean that they dug it out. I doubt that they observed that as termed a diminishment in size.

Q. May I have Dr. McBride's reports?

(Document handed to Mr. Maguire.)

Q. (By Mr. Maguire): Now, have you assumed, Doctor, in your opinion that the pains which were reported in 1950 and pains that were reported in 1953 in early February, were anginal pains? [530]

A. I assumed that, yes.

Q. Upon what grounds did you assume that?

A. They just happen to fit the picture, that's all, and later on when the man died, and he came to autopsy, his coronary arteries were found to be diseased and narrowed, which to me would be rather suggestive proof that that's what it was. Also, I can't imagine a man being given nitroglycerin if the doctor didn't think that he had angina.

Q. Well, don't you know that some of the lead-

(Testimony of Dr. Warren C. Hunter.)

ing cardiologists in the United States and particularly on the coasts, when a person comes in complaining of a chest pain, the doctors prescribe nitroglycerin and ask them if they get a pain to take the nitroglycerin and see whether it relieves it, when they do not have any diagnosis, and when in many instances it is not coronary insufficiency?

A. I think I'd want to know whether the nitroglycerin relieves them the next time, and if it did, I would be pretty sure it was angina, and if it didn't, I'd think the diagnosis was something else.

Q. Is there such a thing as a referred pain?

A. Oh, certainly.

Q. You know Dr. Raymond McKeown of Coos Bay; do you not? A. McKeown?

Q. Yes. A. Oh, yes. [531]

Q. Were you advised of the fact that Dr. McKeown, in this episode of May, 1950, not only took electrocardiograms but gave exercise tolerance tests, listened to the heart murmurs, knowing this man that had been his patient before and was of the opinion that it was a referred pain from arthritis and anxiety or emotional tension?

A. That is his statement; is it?

Q. Oh, it's testimony.

A. Oh. He could have well thought so; I think this later event proved him wrong, but at that time he may have very honestly thought so.

Q. But you found he was wrong then?

A. I think the autopsy proved he is wrong.

Q. The mere fact that a man had some decrease

(Testimony of Dr. Warren C. Hunter.)

in his coronary arteries without you knowing how much would tell you that; give you the opinion that he is wrong?

A. Providing he had the symptoms that this man had under the circumstances and the circumstances under which he died, I would think they were wrong, yes.

Q. Now, let's take the 1953 episode there. There again, electrocardiograms were taken, fluoroscopic examinations made, the activity tests were made, there was neither anything unusual in his blood pressure, there was nothing unusual in any other thing except the man complained he had a pain, and the pain was in his chest and that in taking the activity tests [532] that he—that it did not distress him; here was a man that had nothing in his electrocardiogram, or in his heart beat or anything of that character; you say it would be of—

Mr. Kriesien: If your Honor please, I will object to the question on the grounds that it does not incorporate the arm radiating pains.

Mr. Maguire: I will include that.

The Court: Do you know the question with the addition of the radiation down the arm?

The Witness: I'd like to hear it again, if I might.

The Court: Suppose you rephrase it, Mr. Maguire.

Q. (By Mr. Maguire): All right, sir. Assuming in this episode of 1953 that an electrocardiogram was taken which was a normal electrocardiogram,

(Testimony of Dr. Warren C. Hunter.)

within normal limits; that the blood pressure was well within normal limits; the exercise—under exercise tests he showed no reaction whatsoever in an unfavorable nature; he did not have shortness of breath; that he—I lost the thought, excuse me a minute, sir—oh, that there was no indication of any heart murmur of any kind; that the man had been on a business trip and had been engaged in active business affairs for about two weeks and that prior to taking any medication at all that he commenced—he improved to the extent that the doctor said go ahead on your fishing trip; would you think that that would have any significance at all in determining as to whether or not he [533] was suffering from coronary insufficiency?

A. Unfortunately not.

Mr. Kriesien: If your Honor please, I object to the question on the ground that it incorporated a fact that has not been established, and that is that there was no heart murmurs. The record is silent on that so far as Dr. McBride is concerned.

Q. (By Mr. Maguire): Now, Doctor, in taking a heart test—you know about those, don't you?

A. Taking what?

Q. In taking a heart test, making your medical record? A. Yes.

Q. Would the existence of a heart murmur be of such importance that that would be noted upon the chart?

A. I think it would be noted, yes.

Q. The fact that it was not noted, assume this

(Testimony of Dr. Warren C. Hunter.)

man knows, is reasonably competent, would be indicative to your mind, would it not, that it did not exist; is that not true? A. I think so.

Q. I beg your pardon?

A. Were you ready for the answer to the question?

Q. I thought you answered, I thought so.

A. That refers only—you went back and rephrased a part of the question relating to heart murmurs, and marking the murmur, the answer to that would be I assume it didn't, but [534] I haven't answered the rest of your question, to my knowledge.

Q. No, I am coming back to the questions of pain, are you——

Mr. Mize: Just a moment, your Honor, he hasn't had an opportunity of answering the prime question.

The Court: I don't think there is any question pending now.

Q. (By Mr. Maguire): I thought it was answered, sir. Do all pains in the chest which are accompanied by pains in the arm result from coronary insufficiency, an anginal pain, or do you know?

A. No, there is one other possibility at least where what is known as radicular pain can give pain in the chest, and it could give pain in the arm if it happened to be—if it happened to involve more than one spinal nerve, yes.

Q. Does that pain result from the—can it result from an arthritical condition?

(Testimony of Dr. Warren C. Hunter.)

A. From what?

Q. An arthritic condition?

A. This radicular pain? It is supposed to, yes.

Q. Would it be any—give any weight at all that when he had the 1950 incident that it was discovered that he did have some arthritis?

A. I don't think we know that so far as 1950 is concerned, but the other possibility very definitely exists, don't forget [535] that, you can't put one interpretation on this to the exclusion of the other, it can be one or the other.

Q. I am not questioning you on that part, but you say we do not know whether he had arthritis, which is, in the opinion of the doctor, the cause of the pains that occurred in 1950.

A. Well, the circumstances just don't sound like it. Here is a man who is called to the telephone, and he is apparently some distance away, and hurries across a dock, and when he arrives there, he has pain to a point where he cannot hold a telephone. I think any physician would think first of all of angina as the explanation for it, arthritis don't behave like that.

Q. It does not? A. No.

Q. Don't you know people who have arthritis in the lumbar portion of their spine which upon a sudden movement will just flare up and stab them?

A. In the lumbar spine?

Q. Yes.

A. Now I don't—I have had it—but this isn't there, this is another location.

(Testimony of Dr. Warren C. Hunter.)

Q. Where was it? A. In the arm.

Q. You mean the arthritis in the arm?

A. No, the pain was in his arm. [536]

Q. Oh, I know, but where was the arthritis?

A. I don't know that he had any, I was only stating possibilities.

Q. But if, on examination, arthritis was located in that portion of the spine from which these radicular pains affecting the chest and arm could find their source, would you rule that out?

A. We have no proof that such was ever found.

Q. Were you here during the time all this testimony was taken?

A. No, I am basing it on what was stated in the autopsy plus these incidents in 1950 and shortly before he died in 1953.

Q. Now, as a matter of fact, Doctor, it is a fact and has been medically established and is commonly accepted that simulated heart pains may arise from the chest walls, in the cervical, or from the thorax and is purely functional, or the mediastinal and the structures of the esophagus or stomach?

A. As far as the spine is concerned, yes, I would have a little difficulty believing about the mediastinum.

Q. You are familiar with the nerves going to the heart?

A. To some extent I suppose if it involved nerves it might do it in that location.

Q. Now, assume this man, who periodically, over at least [537] four or five years—all right, take

(Testimony of Dr. Warren C. Hunter.)

three years, has had annual checkups and made no complaint to his physician of any pains in the heart or chest; that he had led an active life; he hunted, he fished, he was in the woods, he led an active, busy life and had no recurrence, if any, or reported any such pain to his doctor in these checkups from 1950 to 1953; if he had an attack such as you mentioned, and which you feel might have been coronary insufficiency in '50, wouldn't you think it most unusual in continuing the same line of life, the same sort of activity, that he would have no other ones between '50 and 1953?

A. Not at all, and I would like to explain why.

Q. All right.

A. It is a well-established fact that men who are examined by physicians for life insurance and who may be applying for very sizeable policies in which instance it is common to require that an electrocardiographic study be made, such studies may have no complaints whatever, may be negative, and the man may die on the day following, and on autopsy we find it is just as was found in this man. It seems incredulous, and yet the thing happens day after day the world over, just that thing, and another thing that I verily believe in from some personal knowledge and talking to others is that a man who is at the head of a family or business and who has great responsibility and who is of the type that has roughed it, let us say, and [538] been active and busy, his threshold of pain for one thing may be very high, maybe he has never had it. Another thing

(Testimony of Dr. Warren C. Hunter.)

that I know from conversations with other men, is that men with responsibilities, family or business responsibilities, are very prone to grin and bear it and say nothing, and he may have had pain that we know nothing of at all. What you say would be correct, but is not of necessity correct.

Q. Well, in other words, if he didn't tell the truth to his doctor, he might have told——

A. He must have told the doctor in Palm Springs something, because he was told to go on this trip if he did not exercise and he was given nitroglycerin to take along with him. Now, the doctor there knew that there was something wrong or he wouldn't have mentioned it, he suspected what the man had.

Q. Are you assuming, Doctor, what went on in Dr. McBride's thoughts?

A. I think you can read it very plainly, yes, by what he did.

Q. I am not talking about what happened in the early part of 1953, I mean May, 1950, and February, 1953, when he had periodic——

A. That is entirely possible that the man didn't have these. We have various thresholds that play on things, for instance, you may reach a stage of anger much later than I do, you may retain your composure much more than I do, you may be able to bear pain much longer than I do, and the same is true of coronary arteries in what happens to them. He may never have [539] had or reached the threshold prior to the pain on the morning he

(Testimony of Dr. Warren C. Hunter.)

died. He may never have reached the point where his arterial supply failed him. Now, that is a lateral view we take, I can't help but bring it in because of the experience I have had and the hundreds of cases that I have seen that these things have to be taken into account, and I verily believe they are true.

Q. According to your judgment, he did have a coronary attack in 1950?

A. I think he may very well have had, it sounds very much like one, yes.

Q. But having had an attack in 1950 and carrying on the same kind of active life and having the same threshold of pain that was the lot of his characteristics, wouldn't you think it quite unlikely in carrying on the type of strenuous life, the same kind of strenuous exercise, that he would have gone for three years without having any attack at all?

A. I am surprised and yet the thing could happen.

Q. You think it would be most unusual?

A. No, I don't think it would be most unusual, because as I said earlier, a lot of men keep things to themselves, they don't tell their wives.

Q. I am not talking about his wife, I am talking about the checkups to his doctor.

A. There at that point, it is entirely possible for the [540] best cardiologist in the United States or anywhere else, too, and a man by every means at his command, diagnostic means that are at his command, and if he has not already had some of

(Testimony of Dr. Warren C. Hunter.)

the more severe manifestations of angina pectoris, which would include formation of a clot in the heart, in the death of some muscle of the heart, if he hadn't had those things he may have a normal electrocardiographic tracing, and as I said earlier, will maybe die on the way home from the doctor's office, and no one has ever discovered anything about it, and we wish we did know, but we don't.

Q. That is not the question, you said you'd be surprised.

A. I think people are always surprised under those events.

Q. Now, you said you would have been surprised if he had actually had an angina or coronary insufficiency in 1950, that he would have had none between then and the one you think could have been one in February, 1953, but what I am asking you, and I do not mean whether he complained to his wife or children, but whether when he went to his physician for checkups wouldn't that be the likely time, if he had any pain and is trying to find out what his situation was, to tell the doctor about it, wouldn't it?

A. You'd think so, but that doesn't always happen.

The Court: Let's avoid the possibility of anything happening to us, so let us take a little recess.

(Whereupon, a short recess was had.) [541]

The Court: Proceed.

Q. (By Mr. Maguire): Doctor, does exercise

(Testimony of Dr. Warren C. Hunter.)

make a greater demand upon the heart muscle and the arteries of the heart, than if one is in the supine or quiet position? A. Yes.

Q. Is it true to say that when one is doing that, the pump, the heart becomes a pump and it works harder or faster?

A. The heart, when it's working harder goes faster, you say?

Q. Or a greater constriction, I should say, I don't—

A. Well, it can do it either way, either by an increase in weight or increase in power or by both.

Q. Now, what we speak about as angina is really a symptom; isn't it? A. That's right.

Q. It's a pain?

A. Yes, angina pectoris refers to it in a certain location.

Q. Yes, it's a pain in the heart muscle?

A. Well, the pain is actually in the chest region.

Q. Well, what causes the pain of angina; is that the heart muscle is not getting enough oxygenated blood to make it function normally; is that true?

A. Well, that's what is commonly believed about it, I have no reason to suppose otherwise.

Q. As a matter of fact, that is a good deal like a cramp you may get in your leg, where the muscle of the leg isn't getting [542] enough blood for circulation, so you get the cramping pain, and it is through the same thing, isn't it?

A. It can be the same, yes.

Q. And elderly people tend to get cramps in

(Testimony of Dr. Warren C. Hunter.)

their feet and their legs, extremities, and their arms because their circulatory system does not get to the legs enough blood?

A. That certainly is a common enough cause of it, yes.

Q. Now, when one is in strenuous exercise, that is the time that the pain—that is the time that the strain is put upon the heart for the greater amount of blood for the heart muscle; isn't it?

A. Yes, the heart has to have more blood then.

Q. And when that occurs, if the heart is not getting enough blood, the heart muscle, I should say, the pain develops? A. Yes.

Q. When we are in exercise and by reason of the exercise and extra work, the heart muscle is not getting enough oxygenated blood, it is what causes the pain?

A. That's the common belief about it, yes.

Q. Well, it's the best that medical science knows up to now; is that right? A. I think so.

Q. Now, it's in evidence here that this man went on this little stroll up a hill, this hill that has been estimated at about a hundred feet high, came back and took up his stand [543] there where the doves were noticed to go over, and that he was there for a considerable number of minutes, approximately 30 minutes, no distress; no shortness of breath; he shot a couple of doves and appeared to be then with no sign of shortness of breath or anything like that. Did you give that any consideration or did you know that?

(Testimony of Dr. Warren C. Hunter.)

A. I know some of those facts and I did consider it. I still believe this thing could come on at the conclusion of or during exercise.

Q. Is it not necessarily so?

A. I beg your pardon?

Q. I say that doesn't necessarily do that?

A. No, not necessarily. It frequently does, but it can come a little later, after all you're dealing with a matter of only minutes here.

Q. Now, have you made any particular study about the effects of strong emotions: joy, sorrow, fear, apprehension, pain, upon the action of the heart?

A. Not myself, no; I have encountered these factors many times, as in many statements that are made to us by the coroner's office in gathering data on people that have died and come to the attention of the coroner, and upon whom we are asked to do autopsies, and in that way, I have seen these operate, but as far as any personal study of it is concerned, no, I have not. [544]

Mr. Maguire: That's all, thank you very much.

Mr. Kriesien: No further redirect examination from Dr. Hunter; he can be excused.

The Court: You may be excused, thank you.

(Witness excused.)

Mr. Kriesien: Call Dr. Watson. [545]

DR. CHARLES EDWARD WATSON

was thereupon produced as a witness on behalf of the defendant herein and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kriesien:

Q. Will you state your name in full?

A. Charles Edward Watson.

Q. And where do you reside? A. Seattle.

Q. What is your profession?

A. Diagnosing and internal medicine.

Q. And you are a duly licensed and practicing doctor of medicine? A. Yes, sir.

Q. And in what state, Doctor?

A. Washington and Illinois.

Q. And do you have a specialty in the practice of medicine? A. Yes, sir.

Q. And what is your medical education?

A. I was graduated from the University of Idaho.

Q. And after graduation from the University of Idaho, did you take any medical education?

A. Yes, sir.

Q. And where did you take that, Doctor?

A. At Rush Medical College of University of Chicago. [546]

Q. How many years did you attend?

A. Well, I attended the equivalent of six years, that is, I took 18 quarters.

Q. After you graduated, did you undertake any postgraduate studies or internships?

(Testimony of Dr. Charles Edward Watson.)

A. Yes, I interned at the Cook County Hospital and a resident in Washington University, Harvard Hospital afterwards.

Q. Have you had occasion to do anything in the field of pathology?

A. Well, while I was a student—or yes, while I was a student I was assistant in pathology and I think about three years I was assistant in pathology and associate.

Q. Do you hold any evidence of your specialty, Doctor?

A. Yes, I am a diplomate of the American Board of Internal Medicine.

Q. And in your practice, do you deal with disabilities of the heart? A. Yes, sir.

Q. Doctor, are you connected academically with any educational institutions?

A. Well, I am clinical professor of medicine at the University of Washington.

Q. Do you have a private practice in addition to that? A. Yes, sir.

Q. How long have you been with the University of Washington? [547] A. About nine years.

Q. That's about the length of time that school has been in existence? A. That's right.

Q. Doctor, have you had any experience with the armed forces during the practice of your specialty?

A. Yes, sir, I spent four years in the Navy during the second world war.

Q. Where were you stationed?

A. Well, I was at Honolulu for 20 months and

(Testimony of Dr. Charles Edward Watson.)

then came back and I was at the Seattle Naval Hospital.

Q. And during that tour of duty, did you have occasion to work in your specialty with heart conditions? A. Yes, sir.

Q. Doctor, you have examined the Plaintiff's Exhibits 13 and 15, being two translations of Mexican autopsy report, one by a Mr. Wilson and one by Dr. Christen? A. Yes, sir.

Q. May the witness see the exhibits, please?

(Documents handed to witness.)

Q. (By Mr. Kriesien): You are familiar with the contents of those autopsy reports?

A. Yes, sir.

Q. Doctor, I, of a necessity, must ask you a rather long, detailed question, and I will ask you to assume the following [548] facts: On February 10, 1953, Mr. Lyons was 49 years of age. He had been in the logging and lumbering business most of his adult life actively participating in the woods operations of his company. He was a dynamic, energetic, successful business executive who drove himself mentally and physically. He was one who kept his physical complaints to himself and was an experienced hunter, familiar with the handling of shotguns. That on or about January 15, 1950, Mr. Lyons was involved in an automobile accident in which he suffered multiple contusions, abrasions, fractured nasal septum, fractured ribs, and he thereafter developed traumatic pleuritis, hemothorax, and gout. That he left the care

(Testimony of Dr. Charles Edward Watson.)

of his physician at Palm Springs on May 6, 1950, to return to Coos Bay. On May 12, 1950, after hurrying across a lumber dock he was seized with constricting chest pains and with pain radiating down the arms to the extent he could not hold a phone; that at that time an E.K.G. was taken and the usual cardiac tests but no objective findings of a heart condition were reported; he was advised he had to slow down.

Shortly before February 3, 1953, he had been on an extended trip to the East Coast which involved considerable responsibility and the exertion of mental and physical effort. On returning to Palm Springs and during the night of February 3, 1953, he had constricting chest pains and pain radiating down both arms. On February 4, 1953, he went to a doctor [549] complaining of constricting chest and arm radiation pain. An E.K.G. was taken and the usual cardiac tests performed, but no objective findings of the heart were reported. However, the doctor prescribed nitroglycerin and his medical case history file states that he may need Thaverine. On February 5, 1953, the pain was some improved and he was advised he could go on a fishing trip if he did not do any excessive work such as tramping around fields or any heavy lifting, that he would also be with two outstanding cardiologists on the Pacific Coast, Dr. Homer Rush and Dr. Francis Chamberlain, and if anything unusual transpired he would be in good hands; that he was to take the nitroglycerin on the onset of pain.

On February 9, 1953, he played a large marlin fish for 30 minutes without exhibiting any evidence of

(Testimony of Dr. Charles Edward Watson.)

cardiac strain or shortness of breath. On February 10, 1953, he arose early, had breakfast, walked at least one-half mile through soft sand and up sand dunes 80 to 100 feet in elevation without evidencing cardiac strain or shortness of breath; that he separated from his hunting companions, one of which heard a discharge of the shotgun followed very shortly by another shotgun shot and approximately 12 seconds later that hunting companion heard stertorous breathing; 30 to 60 second later he was found cyanotic, pulseless and unconscious. He was rolled over in a period of 20 to 30 seconds and pulmonary edema [550] developed in four or five seconds, the stertorous breathing stopped, artificial respiration was given and he expired in a matter of two to five minutes from the time of finding him under the bush.

Doctor, assume further that an autopsy was performed by two doctors that evening, and their autopsy report reads as follows: Now, Doctor, I am quoting from Dr. Christen's report, being Plaintiff's Exhibit 15, that is the short report, Doctor, that is the one on your left beginning with, "The tongue was bitten by the teeth. Transverse skin folds on the frontal region, anterior aspect of the neck and posterior aspect of the neck. Blood crusts on the right and left side of the face. They were more abundant in the first mentioned side. When these were lifted powder dust was found to be encrusted in the palpebral temporal regions and on the ear lobe of the right side. Skin scratches of rounded and linear shape were present in irregular distribution on the

(Testimony of Dr. Charles Edward Watson.)

rest of the face. There is a circular shaped orifice with inverted margins of an approximate diameter of one millimeter in the frontal region, right half, at the site of the hairline. Skin scratches were found on the neck which became evident when the blood crusts on them were lifted; the limits and distribution of these scratches were irregular, but they were more precise than the ones on the face; they vary from half to one millimeter in length, approximately. Scratches [551] on the external aspect of the arm, lower third, elbow, external and posterior aspects of the forearm and dorsal aspect of the right hand. Skull, shape and volume were normal, when the scalp was detached it was noticed that the orifice present in the right frontal region did not reach the bone in depth and that its contours were lost in the fat tissue. Skull articulations were normal; superior sinus had blackish liquid blood in small amount; the brain tissue was somewhat softened. Basilar vertebral arteries, cerebral arteries, and the Willis circle were found to have no alterations. The neurovascular bundles of the neck were dissected and no alterations were found. Thorax. When the sternum and rib cartilages were lifted the chondro costal joints were found to be ossified. There were pleural parietal adhesions of strong type in the posterior aspect of the sternum and the left thoracic cavity. The right lung was found to be free. Both lungs were found to be congested. On cut section, black liquid blood seeped out. The superior and inferior left lung lobes were fused together. The pericardium was found to be thickened

(Testimony of Dr. Charles Edward Watson.)

and it had strong adhesions to the diaphragm. The heart was surrounded by a dense coat of fat tissue. The left ventricle was slightly hypertrophied, the semi-circular valves of the aorta were thickened and hardened with atheromatous deposits, mitral valve was slightly dilated. The coronary arteries were dissected and they were found to have a diminishment in their caliber due to the presence of [552] atheromatous plaques. Abdomen. The liver was very enlarged in weight and volume. It was of dark red color that on cut section presented slight resistance. The gall bladder was filled with a dark green bile in quantities approximating 40 ccs. and also contained two gallstones, one of one centimeter in diameter located in the union of the cystic canal with the common bile duct and also a smaller one about three millimeters in diameter at the bottom of the gall-bladder—both were free.”

Doctor, assuming those facts, do you have a medical opinion as to the cause of death? A. I do.

Q. And what is that opinion, Doctor?

A. That he had first pain in the heart or in the chest radiating down the arms which would be presumed to be due to heart disease, that he had aortic thickening and let's see, what else does it say—well, aortic thickening and he had coronary narrowing, and therefore I would assume that his death was due to coronary disease.

Q. Doctor, assuming the facts that I have just stated, do you have a medical opinion as to the most

(Testimony of Dr. Charles Edward Watson.)

probably precipitating cause of the coronary insufficiency?

A. Well, I think that's speculative, I think you would have to speculate on that.

Q. Well, Doctor, in your opinion, what are the most common [553] probable precipitating causes?

A. Well, they are variable. A great many people die with coronary disease in their sleep, and so you can't just say that any one thing is likely to cause it. Now, exertion is supposed to produce it also.

Q. Doctor, is the finding of the autopsy report that the left ventricle was slightly hypertrophied of any medical significance to you?

A. Yes, I think that it means that in the absence of hypertension that the aortic valve was insufficient.

Q. Does the finding of the semicircular valves of the aorta were thickened and hardened with atheromatous plaques have any medical significance to you?

A. Yes, I think that indicates that his aortic valves were diseased.

Q. Doctor, is the finding that the coronary arteries were dissected and they were found to have a diminishment in their caliber due to the presence of atheromatous plaques of any medical significance to you?

A. Yes, it indicates coronary insufficiency.

Q. Now, Doctor, are there any other findings contained in the autopsy report that are of significance to you?

(Testimony of Dr. Charles Edward Watson.)

A. Yes, the liver was enlarged, the lungs were congested, there were two gallstones.

Q. And what is the medical significance of those findings [554] in your opinion, Doctor?

A. Well, the enlargement of the liver indicates that there is congestion, that is back pressure of circulation and the gallstones, of course, are significant depending on where they are.

Q. Doctor, from the findings of the autopsy alone, do you have an opinion as to whether Mr. Lyons' condition was such that an outside factor was required to precipitate a ventricular fibrillation and death? A. I do.

Q. And what is that opinion, Doctor?

A. That it is not necessary.

Q. What are the factors upon which you base that opinion?

A. Well, people die under all kinds of circumstances. They die in bed and they die following exertion and so forth, so you can't draw any conclusions.

Q. Doctor, do you have an opinion as to whether the superficial injuries to Mr. Lyons' face and neck could have solely and independently of all other causes occasioned his death? A. I do.

Q. And what is that opinion, Doctor?

A. They had nothing to do with it most likely.

Q. Doctor, from your experience in the practice of your specialty, do you have an opinion as to whether an emotional [555] upset or reaction such

(Testimony of Dr. Charles Edward Watson.)

as the discharge of a shotgun close to the face, together with the infliction of powder burns and superficial scratches on the face could be the precipitating cause of the death of a person with a normal heart? A. I think not.

Q. Your opinion, do you have an opinion, Doctor? A. Yes, sir.

Q. What is that opinion?

A. I think not.

Q. What are the factors upon which you base that opinion?

A. Well, I have never seen anybody die under those circumstances, and I can't remember having heard of it, I suppose it's possible.

Q. Doctor, in your practice in the service, did you see or hear of any cases where service men died as a result of an emotional reaction and with superficial injuries? A. I did not.

Q. Doctor, in your practice, have you had occasion to either see or hear of individuals who have sustained severe personal injuries as a result of the discharge of a gun that have not died?

A. I have seen a few, yes.

Q. And, Doctor, have you seen or heard of people who just die of heart failure when they are out hunting? A. Yes, sir.

Mr. Kriesien: That's all. [556]

(Testimony of Dr. Charles Edward Watson.)

Cross-Examination

By Mr. Maguire:

Q. Have you had any occasion to see a person who died from heart failure when they are out hunting? A. No, I haven't.

Q. Do you know whether they die of a coronary occlusion or infarction?

A. Presumably they did.

Q. Now, a coronary occlusion or an infarction is quite different than a coronary insufficiency?

A. Yes, sir.

Q. When you were in the service, I believe you said at Honolulu? A. Yes, sir.

Q. And when did you arrive at Honolulu?

A. August, 1942.

Q. And you remained there about 20 months; is that right? A. Yes, sir.

Q. And then came to the Seattle Naval Hospital? A. Yes, sir.

Q. Let's see. There wasn't any naval action in the close vicinity of Seattle, was there?

A. No.

Q. That was a station hospital; was it not?

A. No, it was not a station hospital, it was a base hospital.

Q. And was Honolulu likewise a base hospital?

A. Yes, sir.

Q. And did you see heart cases in either one of them?

(Testimony of Dr. Charles Edward Watson.)

A. Oh, yes, a great many of them.

Q. Were they heart cases that arose from conflicts? A. Some of them.

Q. And what was the nature of the heart deaths or heart conditions which arose while the man or the patient was in conflict?

A. While he was in combat?

Q. Yes, I should——

A. Well, most of them were people who thought they had heart disease, when as a matter of fact, they didn't.

Q. Well, what made them think they had heart disease; pain in the chest?

A. No, not pain in the chest, they—well, they had various symptoms.

Q. Such as?

A. Well, they'd have shortness of breath and so on.

Q. And shortness of breath came from what; as you observed it?

A. Well, a good many of them I thought came from nervousness.

Q. Fear? A. Yes.

Q. How would fear have anything to do with a man getting [558] shortness of breath?

A. Well, that's direct.

Q. Well, what does it do?

A. What does fear do?

Q. Yes, to give a man shortness of breath?

A. Well, that's one of the things that gives people shortness of breath.

(Testimony of Dr. Charles Edward Watson.)

Q. Tell us the physiology of that, I am not trying to fence with you.

A. Well, as a matter of fact, most people have shortness of breath due to fear, hypertensionally, they breathe too fast and too deep and consequently they get a sensation of shortness of breath.

Q. Does it have anything to do with the action of the heart? A. No.

Q. No difference in beat?

A. No, not so far as I know.

Q. Did you make any observations?

A. Yes, I didn't see anything wrong with them.

Q. And what other kind of heart failure arising from combat did you observe that wasn't just being scared to death?

A. Well, there were certain—I have forgotten how many who had heart disease who had valvular disease of the heart which was not picked up, and they were sent back to the States for disposal.

Q. Well, did it evidence itself in combat, or did the [559] symptoms evidence themselves in combat?

A. Well, I don't remember whether there were any who went into combat and found that they had shortness of breath.

Q. I am just trying to find out if I may, Doctor, I am trying to direct my questions to those heart cases which came under your observation which arose while in combat. Now, we will just keep our minds on that.

A. I don't remember whether there were or not.

Q. Now, did you see any other cases other than

(Testimony of Dr. Charles Edward Watson.)

this fear complex that you were talking about being the sole——

Mr. Kriesien: If the Court please, I move that that be stricken from the record, that is the second time he has said that, and it is not so testified.

The Court: It may go out.

Q. (By Mr. Maguire): No, who are under apprehension and have had imaginary heart trouble. Was there anything else from a heart trouble that arose in combat, other than what you have given heretofore? A. I think not.

Q. Now, when you were at Seattle, did you have occasion there to examine or care for patients who, in service, had heart trouble which arose or evidenced itself during combat?

A. Well, I don't remember whether there were any of them that arose during combat in Seattle.

Q. Or immediately after combat? [560]

A. I don't remember whether there were or not.

Q. Do you know Dr. Nels Larson of Honolulu?

A. Very well.

Q. He has practiced there a good many years?

A. Yes, sir.

Q. One of the leading internists there in the Hawaiian Islands? A. That's correct.

Q. Are you familiar with the work he has done and the investigation he has made of unexplained deaths, where no pathological symptoms of any kind could be discovered other than the fact that they had fear complexes?

(Testimony of Dr. Charles Edward Watson.)

A. I read the article in the Saturday Evening Post.

Q. Is that your only familiarity with this matter?

A. Well, I heard him discussing something about it, but I have forgotten what the discussion was.

Q. Well, as a matter of fact, he cited instances where people have died either from fear of nightmares or in the pain of nightmares?

A. That's right.

Q. Where there is no pathology of any indication other than the cause of death, other than fear?

A. I am not sure about that, but I will admit it, yes.

Q. Do you know all about what the emotions do to the physiology of a person? [561]

A. No, I don't suppose I do.

Q. As a matter of fact, that's one of the things that medical science has not yet plumbed; isn't it?

A. Well, pretty well, yes.

Q. Does anger or fear or unexpected error have any effect upon the physiology of the human body?

A. Yes, it does.

Q. Do you know all of the things it does to the human body; any one of those emotions?

A. I think so, that is, I have a pretty good idea.

Q. What is shock?

A. What kind of shock?

Q. The shock—what we call shock to the human system?

(Testimony of Dr. Charles Edward Watson.)

A. That is a syndrome that is dependent on the vasomotor apparatus.

Q. What do you mean by "vasomotor apparatus"?

A. That means the constricting of the vessels by the sympathetic nerve system. Shock is generally due to a lack of blood, lack of flowing blood.

Q. Well, lack of blood flowing back to the heart; isn't it? A. Yes.

Q. What becomes of that blood when it doesn't flow back to the heart?

A. It pools in the veins of the abdomen and other parts.

Q. It is true, also in that line, a considerable amount of [562] liquid portion of the blood seeps out into the tissues; isn't that true?

A. If it keeps on long enough, yes.

Q. So then, when that occurs there is not a sufficient amount of blood coming back into the heart to be oxygenated or into the lungs to be oxygenated, and then back into the heart; is that right, sir?

A. Well, that's true, yes.

Q. What effect does that have upon the heart?

A. Well, it doesn't get enough oxygen.

Q. Then what happens?

A. Well, then it may stop.

Q. When a person faints what is the physiology of that?

A. There is a drop in blood pressure and the person loses consciousness because he doesn't send enough blood to his brain.

(Testimony of Dr. Charles Edward Watson.)

Q. Well, why doesn't the blood get to the brain?

A. Because the pressure is not up. The pressure is lower than normal.

Q. You mean the force of the pump, the heart being a pump sending the blood up through the arteries to the brain; is that right, sir?

A. Well, that isn't strictly true, it's lack of proper constriction of the arteries and maintenance of blood pressure.

Q. What arteries are you speaking of, about constriction? [563]

A. Of all the arteries.

Q. And what becomes of the blood so that it can't get to the brain, does that act a good deal like you described in shock?

A. Well, no, it's not the same, but for your purposes, yes.

Q. Mr. Kriesien, in his question, mentioned Dr. Francis Chamberlain of San Francisco and Dr. Homer P. Rush, as being two of the leading cardiologists on the Pacific Coast. Do you accept that?

A. Yes, sir.

Q. Are you a diplomate in cardiology?

A. No, just in internal medicine.

Q. And do you have occasions, from time to time to send patients of yours who have some kind of a heart disturbance to a cardiologist?

A. No, sir. I take care of them myself.

Q. You said the gall stones are significant; what do you mean by that?

A. Well, that they may play a part in the se-

(Testimony of Dr. Charles Edward Watson.)

quence of events. That is, that the gall stones might have produced sufficient pain.

Q. Were they embedded or encrusted?

A. Embedded?

Q. So far as the autopsy shows?

A. There was one that was said to be in the cystic duct, [564] the way I understood it, at the junction of the cystic duct and the common duct.

Q. Just read the language.

Mr. Kriesien: Mr. Maguire, the language is not on that document there, it's on that new translation.

Q. (By Mr. Maguire): I think that is number——

A. Well, the bile sac was full of cloudy and dark green bile in approximately 40 cc. in quantity, moreover containing two bile stones, one of one centimeter approximately in diameter, located at the outlet of the mouth of the cystic canal and the other being smaller, three millimeters in diameter and in the bottom.

Q. I see, sir. I will call your attention, Doctor, to Plaintiff's Exhibit 42. May I approach the witness, your Honor?

The Court: All right.

Q. (By Mr. Maguire): Now, where you read that, did you understand the gall stones were——

A. Right here at the junction of the cystic and common ducts (indicating).

Q. And the other one where?

A. In the free gall bladder.

Q. Do you read anything there that that was em-

(Testimony of Dr. Charles Edward Watson.)

bedded or encrusted there? A. No. [565]

Q. Were you informed that both of them were free? A. No.

Q. Didn't Mr. Kriesien, when he was consulting you, show you or tell you about the certificate made by the Mexican doctors that both were free?

A. I don't remember.

Q. If both were free, they would have no significance at all?

A. They might or might not, I don't know.

Q. As a gentleman who no longer has a gall bladder. A. I beg your pardon?

Q. As a gentleman who no longer has a gall bladder. Gall-bladder pains are very intense; are they not? A. They may be.

Q. They tend, if there is a gall stone which is embedded or encrusted or is being pushed through that little canal at a point about the center just under the sternum and the pain kind of radiates out, the pain increases; is not that true?

A. In some cases, yes.

Q. But it is something that starts certainly with comparatively little pain and then increases in volume; the pain?

A. Well, it varies considerably with different cases.

Q. Well, if the gall stones are not embedded or encrusted and are free, is it at all likely that you would have any change in any physiology, if they are free? [566] A. Probably not.

Q. If a gall stone one centimeter in diameter

(Testimony of Dr. Charles Edward Watson.)

could have been forced through that little canal, that would be accompanied by excruciating pain; would it not? A. Very likely.

Q. And it would be a matter of considerable amount of time for it to be pushed through that canal, if it could be at all?

A. Well, yes, I think so.

Q. And a gall stone of that size that was pushed through that canal would make—have physical signs in the walls of the canal of that having occurred; is not that true?

A. It would be likely to, yes, sir.

Q. Well, it would be impossible for that not to mark it, if that had happened; isn't that true?

A. Yes, I think so.

Q. Now, the congestion of the liver you say is something that may have some significance?

A. It has a great deal.

Q. What significance do you think that has?

A. I think that means that there was back pressure in the circulation.

Q. In other words, the pump was not carrying the blood back from the organs to be reoxygenated by the lungs and then pumped out as arterial blood from the heart; is that true?

A. That is correct. [567]

Q. How much, Doctor, as you read this autopsy, was the caliber of the diameter of the lumen of the coronary arteries?

A. It didn't make any statement.

Q. Does the degree of diminution of caliber have

(Testimony of Dr. Charles Edward Watson.)

anything to do with the question of the health of the body and the muscle of the heart getting enough blood to conduct their work?

A. Yes, that's generally true, however, we see patients who have extreme narrowing of the coronary arteries without any symptoms as far as that is concerned.

Q. Leading a normal life?

A. Well, leading a fairly normal life, yes.

Q. Well, carrying on their usual affairs of life?

A. Yes, providing they're not strenuous.

Q. Now, these people that have an extreme diminution, about how much of the diameter of the lumen—how much of the lumen is occupied by these plaques, or whatever you may call them, that is this thing you are referring to?

A. Well, I couldn't give it to you in percentages.

Q. Well, you can just approximate.

A. I would say half, however, that doesn't follow that everybody can have a half of his coronaries obstructed and not develop symptoms.

Q. Well, it's quite—it may be a little repetitious—but you will agree with me that on an autopsy, that is a very [568] simple thing to determine by measurement or by observing the degree of diminution?

A. Yes.

Q. When did you graduate from the University of Idaho, Doctor?

A. 1913.

Q. 1913, and you were about what age at that time?

A. I was 23.

Q. So you were born about 1890?

(Testimony of Dr. Charles Edward Watson.)

A. I was born in '89, in the fall.

Q. Does the human mechanism change naturally in the course of growing older? A. Oh, yes.

Q. Is that disease?

A. Would you repeat that, please?

Q. Is that disease?

A. Some of it is and some isn't.

Q. But the fact that your bones are more brittle, that's just a natural progress of age; isn't it?

A. I suppose so. . .

Q. And the fact that the lenses of one's eye do not retain their shape and we have to have glasses, that is a matter of growing older; is it not?

A. I presume so, yes, sir.

Q. And that then is what happens to the other functions of [569-570] the body as well as to the legs and eyes; does it not?

A. Well, to some extent, yes.

Q. None of those things are diseases, are they?

A. Well, some of them are, yes. Some of them are diseases and some of them are not.

Q. Do the walls of one's arteries change with age? A. Yes.

Q. Naturally?

A. Well, there are certain changes probably that are the result of aging.

Q. What are those changes?

A. Well, loss of elasticity.

Q. What about hardening?

A. What about what?

Q. Hardening.

(Testimony of Dr. Charles Edward Watson.)

A. Hardening of the arteries?

Q. Yes.

A. I think that is a—considered to be a disease process.

Q. Well, as a matter of fact, there are—it is the most rare thing that people get in the elder part of the life, that is their arteries are hardened?

A. It's a rare thing?

Q. No, most general thing.

A. Yes, that's true.

Q. In fact, it is fair to say that it is a rare occasion that [571] you don't find the hardening?

A. Well, that varies a great deal. We see people in their 70's and 80's who have very little hardening, but in general, it is a progressive condition that is present.

Q. Well, if practically everybody has it in degrees, what is the disease they are suffering from other than old age? A. I beg your pardon?

Q. If practically everybody has that, has hardening of the arteries, what is the disease they are suffering from, other than old age?

A. Well, they suffer from atherosclerosis, for instance.

Q. Practically everybody has atherosclerosis?

A. No, sir, not practically everybody, but a great many have, yes.

Q. But you said it is a rare person above 70 years who doesn't have some degree of hardening of the arteries? A. That's right.

Q. So it is fair to say that a great many do have?

(Testimony of Dr. Charles Edward Watson.)

A. Yes.

Q. Are the great majority all diseased with respect to that atherosclerosis? A. I'd say so.

Q. Well, what is the disease?

A. We don't know, definitely.

Q. Well, if you don't know what the disease is, how do you [572] know it is a disease and not a natural process?

A. Well, I think we have learned enough about it so that we know it's a disease.

Q. Well, what do you know about it that makes you know it is a disease?

A. Well, we know that even young people develop deposits of cholesterol in their blood vessels, and as time goes on, this increases and it is believed that that has to do with the increase in the cholesterol in the blood.

Q. Yes. A. Now——

Q. Do you know what causes it?

A. No, we don't know definitely.

Q. Now, I understood your testimony, Doctor, was that you said that so far as the pains in the chest of 1950 and '53, you presumed to be due to heart disease; is that right? A. Yes, sir.

Mr. Maguire: That's all.

Redirect Examination

By Mr. Kriesien:

Q. Doctor, just one question. Is this hardening of the arteries the same as having atheromatous plaques in the coronary arteries? A. Yes.

Mr. Kriesien: That's all, thank you. May the witness [573] be excused?

The Court: You may be excused, Dr. Watson, thank you.

(Witness excused.)

Mr. Kriesien: Shall we proceed?

The Court: What is your pleasure?

Mr. Kriesien: I am perfectly willing to go right ahead.

Mr. Maguire: If counsel wishes.

The Court: Let us go until 4:30.

Mr. Kriesien: We will call Dr. Wilson. [574]

DR. CHARLES R. WILSON

was thereupon produced as a witness on behalf of the defendant herein and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kriesien:

Q. Will you state your name, please?

A. Charles R. Wilson.

Q. Where do you reside?

A. Portland, Oregon.

Q. What is your profession?

A. Physician and surgeon.

Q. You are a duly licensed and practicing doctor of medicine? A. I am.

Q. Have you a specialty in the practice of medicine? A. Internal medicine.

(Testimony of Dr. Charles R. Wilson.)

Q. What was your premedical education, Doctor?

A. Bachelor of Arts degree, Reese College.

Q. And what was your medical education?

A. M.D. at Johns Hopkins.

Q. And when did you graduate, Doctor?

A. 1924.

Q. And since that time have you been actively engaged in the practice of your profession?

A. If I may have the interval of time in which I was in hospital work and not in private practice of medicine. [575]

Q. That's what I am after, I mean after graduation, under these various M.D.'s where you were serving your internship.

A. Yes, I was at Peter Bent Brigham Hospital in Boston under Dr. Christian and Dr. Levine. I had my assistant residency and residency at Vanderbilt University Hospital in Nashville, Tennessee under Canby Robinson, Sidney Burwell, T. R. Harrison, and Alfred Blalock. That was a two-year period.

Q. And when did you finish the last of your medical study postgraduate work, Doctor?

A. 1928.

Q. Doctor, where was that last postgraduate work that you were referring to?

A. That was at Nashville, Tennessee.

Q. I see. Doctor, have you had occasion to write any treatises or do any research on sudden death or diseases of the heart?

A. The latter, yes.

(Testimony of Dr. Charles R. Wilson.)

Q. All right. Will you tell us just generally what that is?

A. Well, in this training period and subsequently, I have had occasion to write articles on diseases of the heart and in this training period, the work was done with the men that I have mentioned, who are outstanding for their research work in heart disease, one of them is the author of the prominent text in internal medicine, one of them, who is [576] now a professor in surgery, and who is known for his work in the heart and circulation, that is Dr. Blalock, and his operations on the heart. Dr. Burwell is known for his work in circulation physiology of the heart, Dr. Robinson is known for his work on the physiology of the heart and circulation.

Q. Doctor, have you had occasions to write any treatises or articles for medical journals or textbooks in your specialty? A. I have.

Q. And what, generally, are those, Doctor?

A. Well, they deal with a variety of subjects. Those dealing with the heart will be found in some of our leading journals in heart disease, such as the American Journal of Physiology, the Archives of Internal Medicine, the American Journal of Medical Science.

Q. Doctor, in the practice of your specialty or in your—somewhere along your varied studies, have you had occasion to work with pathology?

A. I have.

Q. And will you tell us about that, please?

(Testimony of Dr. Charles R. Wilson.)

A. I have had the privilege of working in pathology in Johns Hopkins after I graduated, which was not included in my formal training. I have never forgotten what I learned there at the autopsy table. I had the privilege of working with fine doctors and did autopsies with them for a period of six months. I have been very attentive and diligent at [577] the autopsy table, trying to see all of the cases of mine that have died, seeing their autopsies personally, witnessing the autopsy or merely going over the tissues with the pathologist at the end of the autopsy, also in 19—the year I do not exactly recall, but it was about 1937, I did the autopsies at Good Samaritan Hospital.

Q. Doctor, are you called upon occasionally to examine autopsy reports and give your opinion as to the cause of death? A. Yes, I am.

Q. And under what circumstances; if you will just tell the Court what the circumstances are, generally?

A. Well, we have an exercise in medicine, in medical teaching, called a clinical pathological conference in which the protocol is given to a clinician, and on the basis of this protocol arrive at the cause of death and it is discussed before students and faculty or postgraduate groups and the pathologist gets up and presents the pathological material, and then there is a discussion between the clinician and the pathologist.

Q. Now, Doctor, are you connected academically with any medical school? A. I am.

(Testimony of Dr. Charles R. Wilson.)

Q. And what school?

A. University of Oregon Medical School. [578]

Q. And what is your connection with that?

A. I am clinical professor of medicine.

Q. About how long have you been connected with the University of Oregon? A. 1928, I started.

Q. And are still, presently? A. I am.

Q. Doctor, you have examined Plaintiff's Exhibits 13 and 15, being translations of the Mexican autopsy report at our request and you are familiar with them; is that correct? A. I am.

Q. And, Doctor; may the doctor have the exhibits?

(Exhibits handed to witness.)

Q. (By Mr. Kriesien): Before we get to the hypothetical question, Doctor, have you had occasion to ascertain what the drug by the name of Thaverine is? A. I have.

Q. Are you familiar with its composition?

A. I am.

Q. Could you tell us just generally what it is and what it is used for?

A. Well, it is a drug compounded as a combination of two drugs, Theophyllin and Ethaverine. Theophyllin is used to dilate arteries and Ethaverine is used to relieve pain, and to dilate arteries and is a mild sedative; is a non-narcotic [579] relative of a drug used in rare diseases as a narcotic and is related to morphine and opium. This combination is used in heart disease.

(Testimony of Dr. Charles R. Wilson.)

Q. Thank you, Doctor. Doctor, I will ask you to assume the following facts, and I hate to be repetitious about this, your Honor, but I know——

The Court: Well, I was just wondering if the doctor, he has heard it twice now, the same question, and can it be stipulated that the doctor is being asked the same question, and that he has an opinion, and then we will get along with it?

Mr. Beebe: We will so stipulate on behalf of the plaintiff that the same hypothesis that he put to the other two doctors will be the same.

The Court: Are you willing to accept it?

Mr. Kriesien: Yes. And you have heard that question, have you not, on two different occasions?

The Witness: I have.

Q. (By Mr. Kriesien): You have also read the question? A. I have.

Q. Doctor, assuming that question, do you have—assuming those facts as related in the question I have propounded to the other doctors, which you have read, the hypothetical question, do you have a medical opinion as to the medical cause of death of Mr. Lyons? A. I do. [580]

Q. What is that opinion, Doctor?

A. It was due to coronary insufficiency.

Q. Doctor, assuming those facts, do you have a medical opinion as to the most probable precipitating cause of the coronary insufficiency?

A. The most probable—yes, I do.

Q. And what in your opinion would be the most probable precipitating cause?

(Testimony of Dr. Charles R. Wilson.)

A. The most probable precipitating cause was angina pectoris.

Q. Now, Doctor, I will ask you to tell us the factors upon which you predicate your opinion of the medical cause of death and also your opinion as to what is the most probable precipitating cause of the coronary insufficiency, or should I divide them for your convenience, Doctor?

A. I would prefer them divided.

Q. Doctor, can you give us the factors that you have taken into consideration in arriving at your opinion as the medical cause of death was a coronary insufficiency?

A. Yes.

Q. Will you do so?

A. There is a history which I cannot overlook in medical practice, particularly a man complaining of constricting pain in the chest with radiation to the arms, to me, is angina pectoris until proved otherwise. That is a dictum that I have been taught, and I teach, and I have advised as [581] graphically as I can clinically, and I believe that it stands up as the one thing that I must prove, when that symptom appears, that of constricting pain with a radiation to the arms. We have two descriptions of this. One in 1950, one in 1953. We have, in addition, the use of, or the prescription of a drug which is used to relieve the anginal pain, and other conditions also, and another drug that is present, and also is a possibility, Thaverine. This would lead me to believe that Mr. Lyons did have angina pectoris. Angina pectoris is due to symptoms, it is due to insufficiency

(Testimony of Dr. Charles R. Wilson.)

of flow of the blood through the coronary arteries. He had a narrowing of the coronary arteries described in the autopsy protocol.

Q. Now, Doctor, are the findings of the aortic valve being thickened and hardened with atheromatous deposits of any medical significance to you in this case? A. They are.

Q. Is the finding of the left ventricle slightly hypertrophied of any medical significance to you?

A. It is.

Q. What is that medical significance of those two factors or findings?

A. One would state that there is aortic insufficiency, by virtue of the leakage of this valve back to the heart, which is what insufficiency is, would diminish or narrow circulation [582] and therefore would contribute to the coronary insufficiency. The hypertrophy of the left ventricle would indicate that the heart was working for some reason, harder than it should. One of the most common causes of hypertrophy, is aortic insufficiency.

Q. Doctor, going back to your opinion of the occurrence of 1950 being angina pectoris, would the existence of an arthritic condition of the spine have any bearing on your opinion as to that particular occurrence?

A. The pain, as I'd better—no, it would not, no, it would not.

Q. Why do you say it would not?

A. Because the pain as described is a constricting pain in the chest with radiation into the arms, and

(Testimony of Dr. Charles R. Wilson.)

well—just that. A constricting pain radiating to the arms.

Q. And are those pains the same type of pain that may be associated with radicular pain from arthritic conditions? A. They are.

Q. To the extent that one could not hold a telephone? A. They are not that type of pain.

Q. I see. Have you had any special training, Doctor, in the field of arthritis?

A. Yes, I have.

Q. And what are your qualifications or what are your studies in that respect? [583]

A. This has been one of my main hobbies, I put that in quotation marks, in medicine for many, many years. I started about 1930 and I have talked, lectured on arthritis since that time. I am a member of the American Arthritis Association and attend their proceedings; read diligently in the matter and see lots of patients with arthritis. I have had occasions to examine them for the Accident Commission for problems of disability.

Q. Doctor, from the findings of the autopsy alone, do you have an opinion as to whether Mr. Lyons' condition was such that an outside factor was required to precipitate a ventricular fibrillation and death? A. Yes, I have an opinion.

Q. And what is that opinion?

A. That it is not necessary to have an outside factor.

Q. And what are the bases upon which you make that opinion?

(Testimony of Dr. Charles R. Wilson.)

A. He has described a narrowing of the coronary arteries or an aortic insufficiency, and he has stones in the gall bladder, one in the gall bladder and one in the cystic duct, excuse me.

Q. Of what medical significance to you is the gall stone that is located in the cystic duct at the union with the common bile duct, that stone being one centimeter in diameter?

A. The significance is that it must have been passed, in my opinion, from the gall bladder into the cystic duct. A stone [584] of that size must have been passed through with pain with an impact, which is so jolting, if I may use that expression as to get away from this word "shocking," so jolting that it creates a reaction in the individual that is faster than his recognition of pain.

Q. And what would that reaction be, in your opinion, Doctor?

A. It would be an extreme reaction in the nervous system causing a reflex.

Q. And by reflex, what do you mean?

A. I mean that the impact of the stone passing would set up a nervous impulse which would be transmitted through channels to the coronary arteries, either at a low level through the spinal cord or through the sympathetic system or through a higher center or through the brain center, it goes one of three pathways.

Q. And would that make a change in blood demand upon the heart, in your opinion?

A. Yes, it would.

(Testimony of Dr. Charles R. Wilson.)

Q. Well, I will ask you whether or not in your opinion that could be a precipitating cause of a ventricular fibrillation and death?

A. Yes, it could.

Q. In addition to the possibility of your opinion on the gall stones, are there any other conditions revealed that could have precipitated—by the autopsy report that could [585] precipitated a ventricular fibrillation and death?

A. Any patient who has coronary narrowing can develop ventricular fibrillation.

Q. Can ventricular fibrillation develop, Doctor, without any precipitating cause, outside precipitating cause?

A. I presume that it can without any recognizable—any one that we would be able to recognize, but I would certainly not think that a ventricular fibrillation could start it just as a cause inside the artery without something to do it.

Q. Doctor, do you have an opinion as to whether superficial injuries to Mr. Lyons' face and neck, solely and independently of all other causes, could have caused his death?

A. The superficial injuries?

Q. That is right, do you have an opinion?

A. I have an opinion.

Q. And what is that opinion, Doctor?

A. I think it would be extremely unlikely.

Q. Now, Doctor, what are the most commonly accepted precipitating causes of ventricular fibrillation and death?

(Testimony of Dr. Charles R. Wilson.)

A. The major factor which will comprehend most of the secondary precipitating factors would be the development of the localized area or a generalized area—generalized lack of oxygen in the heart that would set up an area of irritability from which impulses could arise and a ventricular fibrillation to start. This lack of oxygen can come upon a [586] variety of what we might call secondary factors of ventricular fibrillation, and that this would be the first and main one. The secondary causes would be any emotional factor, and by emotion, I mean fear, anger, rage, pain, happiness, joy are fundamental emotions.

Q. In addition to the emotion factors are there other common precipitating causes, the secondary factors, such as exertion?

A. If you have a small coronary supply and can get an angina pectoris syndrome started, that is also a factor, a secondary factor in contributing to this lack of oxygen to the muscle of the heart and starting off this irritability which eventually becomes ventricular fibrillation of the ventricle.

Q. And are there any other factors that come to your mind?

A. Well, injury, particularly injury, of course, to the heart muscle and any—during severe infection, the patient also gets this condition from the medical shock, there is a diminishment in the blood pressure and the pulse is diminished, even to the extent that it becomes absent. Medical shock, then from any other reason would do it.

(Testimony of Dr. Charles R. Wilson.)

Q. Doctor, in your practice, do you have an opinion as to whether or not it is possible for an individual to suffer an attack of angina pectoris and go three years without suffering another attack of angina pectoris? A. I have an opinion.

Q. And what is that opinion? [587]

A. It is entirely possible.

Q. And can they go longer periods than that?

A. They can.

Q. In other words, I take it, the time element in your opinion is of no moment in this particular case, the attack of 1950 and the attack of 1953?

A. No, it is of no moment to me, of no moment to me.

Q. I see. Doctor, can an individual have a normal electrocardiogram and normal, or the usual cardiac tests given and all result in a negative way and still shortly thereafter die of a heart condition?

A. He can.

The Court: I believe all of the experts have agreed upon that.

Mr. Kriesien: I think this is probably repetitious in that matter, your Honor.

Q. (By Mr. Kriesien): Oh, Doctor, medically speaking, is the narrowing of the coronary arteries from atheromatous plaques considered a disease of the arteries? A. It is.

Q. And, Doctor, at our request, you examined Exhibits 13 and 15, being the two translations of the Mexican autopsy report, and I will ask you if there

(Testimony of Dr. Charles R. Wilson.)

is any change of any material medical findings within the two translations?

A. To me, there is not. [588]

Mr. Kriesien: I believe that is all.

The Court: Well, I think we had better take up the cross-examination tomorrow. Adjourned until 10 o'clock, because I have a naturalization tomorrow which will take but a few minutes.

(Whereupon, an adjournment was taken until 10 o'clock a.m. of the following day.) [589]

(Pursuant to adjournment, proceedings were resumed at 10 o'clock a.m., December 8, 1955.)

(Dr. Charles R. Wilson thereupon resumed the stand.)

Direct Examination

(Continued)

By Mr. Kriesien:

Q. If the Court please, I neglected to ask Dr. Wilson of one matter concerning the gallstones, and I would like to have him explain and may we have the chart, Mr. Clerk?

(Document handed to witness.)

Q. (By Mr. Kriesien): Dr. Wilson, I would like to have your explanation for the Court how this gallstone of one centimeter in diameter could traverse down the cystic duct and the physiology of the advance and what it does in your opinion, insofar

(Testimony of Dr. Charles R. Wilson.)

as being one of the precipitating causes of a ventricular fibrillation.

A. The position of this one-centimeter gallstone is reported as being at the junction of the cystic duct with the common bile duct, here in the hepatic duct, and the common bile duct, and this duct (indicating), although it is only three millimeters in diameter and is an average size, is not a constant size affair. This is composed, this duct is composed of smooth muscle and the same way as the small intestine and large intestine, it is subject to nervous influences [590] from the sympathetic and parasympathetic nervous systems, one of which will dilate the duct, actively dilate it and cause it to enlarge in size, and the other will cause it to contract and become small in size. The action of any material, whether it's bile, the normal bile or anything else that passes down this duct must be influenced by this mechanism in which the sphincters or the muscular appendages that are present at the outlet of any organ, retains the secretion of that organ or whatever it is until a nervous influence comes along and dilates it and allows it to go through. This is, the capacity for dilatation of an organ or of a duct is simply tremendous, and you can have—it is possible for this duct to enlarge to a capacity that will let a one-centimeter stone through it. Now, to start that mechanism off, and as the stone approaches the beginning of the cystic duct, there has to be an impact. This stone comes, it hits, and the impact—and the gall bladder tries

(Testimony of Dr. Charles R. Wilson.)

to expel it. There is then a nervous reaction to dilate it, let something go through, and the stone slips into the cystic duct. Also, if this stone would arrive at the outlet of the cystic duct or the common duct, we have the same adaptive mechanism and muscular tissue, just as we have at the end of it, such as you have from the stomach going to the small intestine, or the small intestine going to the large intestine and to the rectum or anus. These are all mechanisms of the smooth [591] muscle which retains materials until the body is ready to release them. You have the same problem of pain at this time, between these points, there is apparently no pattern, simply lies in the common duct. There is very little evidence that there is pain arising from convolutions of this muscle, but you get pain where this duct enters the small intestine; you have extreme pain again when it passes this point, and again it is one of the most severe pains that the body is subjected to, that is the pain when it goes out to the outlet of the gall bladder proper and to the cystic duct, and the pain at outlet of the cystic duct to the common duct is extremely severe. After a stone has passed this area, we get, as far as we know, very little distortion in the cystic duct itself, the duct can dilate and enlarge, and whatever is there can lie free. I see no reason to have any question about the statement in the autopsy protocol that this stone lies free in the cystic duct. That's entirely physiological. I would expect it. The pain would arise here at the outlet of the gall bladder at the cystic duct or at the outlet of the

(Testimony of Dr. Charles R. Wilson.)

cystic duct and into the common duct, and not along the lining of the duct. That answers, I think, the first part of your question. The other is how does this tie in. In my conception and in my opinion with ventricular fibrillation, I think——

Q. That is correct, Doctor. [592]

A. I have mentioned the sympathetic and parasympathetic nervous system, the autonomic nervous system is not subject to control, it is not a system which concerns itself with pain sensations, as we know pain, it has no ready consciousness of pain that we describe as pain, this is a deep pain and has a peculiar characteristic, that is medically spoken of as an indistinguishable pain, that is a deep, agonizing type of pain, it is one of those pains that threatens integrity and creates a great anxiety when it hits. This is true of all mesenteric mechanisms and it is true of a gallstone passing as, if I may use a common example of this type of pain of green-apple colic, that is terrifically severe pain, and patients get sick and sweat just because the intestinal tract comes down in a cramp and it is an indistinguishable thing that you never want to have again, so this is one of the same type of pains that sets up the impact, the thing starting sets up a reaction in the nervous system which can be transferred to the sympathetic nervous system back down the back through the parasympathetic nerves at a low level near the heart and into the heart, the so-called gall bladder coronary reflexes to the visceral coronary reflexes or it can be higher in the sympathetic sys-

(Testimony of Dr. Charles R. Wilson.)

tem and come into the next sympathetic or back of the heart or it can go to a higher center where it can be recognized as pain conscious and be referred back to the heart. [593]

The Court: Doctor, tell me, is the passage of these gallstones a frequent occurrence in medicine? I mean, a person with gallbladder disease who has present in his gallbladder such stones as are described there, do those stones usually pass in the fashion you have described?

The Witness: Yes, sir, they frequently pass, as evidenced, your Honor, these stones; the gallbladder may be found with one stone or a hundred small stones and we also have to explore very carefully the common duct to be sure during the course of surgery, that a stone is not left in the common duct that passed from here down to here (indicating), I do not believe——

The Court: Is that common duct operable?

The Witness: We can open the common duct, and have the muscles sewed afterwards, of course.

The Court: Now, is there any way that given the presence of gallstones, that they may be dissipated or otherwise eliminated without medication of any kind?

The Witness: No, sir, that is not possible. That is an old, old thought and there is an old trick in doing this, if I may explain it?

The Court: Yes.

The Witness: Of giving a substance of calcium carbonate and oil, and you hear of these pieces in

(Testimony of Dr. Charles R. Wilson.)

the stool, and they have innumerable patients that are duped in this manner, that [594] they are passed, you see all gallstones are passed in your stool.

The Court: Then they are really not gallstones at all, they are really just small calcium deposits?

The Witness: With bile stains.

The Court: All right.

Q. (By Mr. Kriesien): Dr. Wilson, in your opinion, could that gallstone being located at the site designated on the exhibit be formed at that particular point?

A. In my opinion, it could not, without a great many symptoms.

Q. And what would those symptoms be?

A. They are generally what we ordinarily call dyspepsia indigestion disturbances after eating and uncomfortableness in the stomach from overeating, or hyperacidity, regurgitation, actual pain with reference in a very peculiar manner into the right shoulder area, a typical radiation of the gallbladder colic which ranges in symptoms from what we would take a bicarb for to severe pain.

Q. Doctor, do you know what period of time would be required to have that stone travel from the outlet of the gallbladder through the cystic duct to the common bile duct?

A. I couldn't possibly specify a time, it could be a matter of a few seconds, it could be a matter of an hour or two.

Q. And in your opinion, Doctor, would the pas-

(Testimony of Dr. Charles R. Wilson.)

sage of a gallstone of one centimeter in diameter into the cystic duct [595] from the gallbladder produce excruciating pain?

A. Passing from the gallbladder to the cystic duct, passing from the sphincteric muscle, this muscular adaptation is painful.

Mr. Kriesien: That's all, your Honor.

Cross-Examination

By Mr. Beebe:

Q. Doctor, while you have that chart, I will ask you about it, and we will not have to bring it back again. That cystic duct has a number of spiral valves in it, does it not?

A. Well, essentially that's all right.

Q. Yes, and this stone was found there, of course, on autopsy; that's true, isn't it?

A. So it states, yes, sir.

Q. Now then, I believe you said that when you do an operation for gallstones, you have to explore the common bile duct to be sure there isn't a stone down there in the common duct; is that correct?

A. That's true.

Q. Now then, it's possible, is it not, that this stone was in the common bile duct and just simply happened to be at that point when the autopsy was performed; isn't it?

A. I know of no medical cases of a stone that has ever passed back from the common duct to the cystic duct and I have certainly looked for evidence of that effect; also, I [596] have never seen it, and in

(Testimony of Dr. Charles R. Wilson.)

talking to pathologists, this is not a mechanism. Also, if I may further that answer?

Q. Well——

A. If it does pass back, if we can hypothecate that it is going to happen, it will have to pass the sphincteric muscle again, and again with pain.

Q. Yes. Now, Doctor, of course you are assuming that the man was still alive, that it didn't come back if it caused pain? A. Oh, yes, obviously.

Q. Now, Doctor, this was described as being at the union of the cystic duct and the common bile duct; is that correct? A. Yes.

Q. And you think that that means that it was still in the cystic duct; in other words, the last sphincter?

A. Yes, that was my interpretation.

Q. Now, Doctor, I believe you said that the cystic duct is about three millimeters in diameter; is that correct?

A. That is its average size as given from examination, yes.

Q. And the one centimeter stone, that would be ten millimeters, wouldn't it? A. That's right.

Q. And you say that this has a great elasticity, this cystic duct so that this stone could go through there in [597] a matter of seconds?

A. If, by elasticity—yes, that's true if by elasticity, you mean a muscular elasticity which would not follow, for this is muscular tissue and the action, an active process of enlarging just as your pupil will enlarge to accommodate light and it is con-

(Testimony of Dr. Charles R. Wilson.)

trolled by a small mechanism of enlarging and contracting, the average size of it is given as two millimeters, and may be pinpoint, it may be completely the size of the iris.

Q. Now, the stone—if a one centimeter stone passed through a cystic duct, did you say, that has an average size of three millimeters, Doctor, suddenly, or in a matter of seconds passed through the first one, why would you say you would have pain, that would be a rather sudden occurrence, would it not?

A. It would.

Q. And then if it went clear on down through to the other end, would you not expect the pathologist to find the evidence of trauma? A. No, sir.

Q. You would not. In that respect do you disagree with Dr. Hunter?

A. I do, because of this mechanism of dilatation down the canal. The canal can enlarge, after it gets through the ducts, it can lie free in this duct. It doesn't actually refer, as [598] you spoke of valve, but I say they are not valves in the sense that you are talking about a heart valve or a valve in a pump or anything of that kind, they are vestiges of structures that have existed in times past, and in evolution, they apparently, because of, oh, rotation mechanisms, the gallbladder and its structure has developed in the human being. They have been called apparently valves of hyster but they are really not valves, they are muscular rings in that tube, and they are subject to the dilating mechanism just as the muscular adaptations at the outlets.

(Testimony of Dr. Charles R. Wilson.)

Q. Now, Doctor, in your experience, how many autopsies have you performed in which you concluded that there was a stone of at least one centimeter which had gone through as a swift movement as distinguished between one that took several hours?

A. The question is how many that I have personally performed?

Q. How many have you seen where they have gone through in a matter of seconds?

A. This is an absolutely impossible question to answer, I have seen none that I could say they have gone through in a matter of a second.

Q. How many have you seen which—of that size, located at the point or similar point to this—which was as much as one centimeter in size?

A. One.

Q. One, and you don't know how long before the autopsy that [599] had gone through?

A. I know of how long before the autopsy that pain arrived and the man died, I saw it.

Q. And how large was that stone, Doctor?

A. I would say it was approximately one centimeter, I do not have the measurement of it in mind.

Q. Now, you said on direct examination that this reflex from such an occurrence would bring about an interruption in coronary blood flow and/or could bring an important interruption in the coronary blood flow and ventricular fibrillation and death; is that correct?

A. I did, yes.

(Testimony of Dr. Charles R. Wilson.)

Q. And you think that that is one of the possible causes here, I believe you said you—you used the word “possible”? A. I do.

Q. Now, Dr. Wilson, in your practice I believe you testified on direct examination that it is possible for a man to have a chest pain which was a part of the true angina pectoris syndrome and then be without any further such pain for three years, is that correct? A. That's correct.

Q. Is that the frequent or usual occurrence, Doctor?

A. It's an entirely frequent occurrence, and I happen to be an exhibit of it.

Q. You, yourself? [600]

A. I am speaking from personal experience, I have gone five years without an anginal attack.

Q. And you knew that you had an anginal attack, the first you had was diagnosed as an anginal attack? A. Yes, sir, I knew it when it came.

Q. And you were under treatment, weren't you, for the next five years?

A. They tried to keep me under treatment for five years, yes, sir.

Q. And you changed your way of life a little bit, didn't you, at that period of time?

The Court: In other words, you refused to adopt the advice of the physician? I think—in other words, you didn't follow your doctor's orders, did you?

The Witness: No, sir, I did not, I engaged in fishing, wading in the Deschutes River and have

(Testimony of Dr. Charles R. Wilson.)

been eating and going to banquets, and doing various things that my wife and my physician haven't quite wanted me to do, and without pain.

Q. (By Mr. Beebe): And did you take treatment, though, during that period of five years, medication to relieve the condition, and so forth?

A. No, I have never taken any medication, I carried nitroglycerine for a while but it got quite boring to change it from suit to suit.

Q. Doctor, did you have a coronary occlusion and go to bed?

A. I was put to bed, I have no proof that I ever had a coronary [601] occlusion, I never have been allowed to examine my hospital record, my electrocardiograph. They tell me what showed, there was never any evidence on those that there was a myocardial infarction, that is a coronary occlusion with blockage to the heart muscle.

Q. And so, because of that experience of yours, you know that it is quite frequent that a man may have an attack that is of pain, that is the true angina pectoris syndrome and go on without changing his way of life, lead an active life continuing to work hard with long hours, engage in exertion and never have another attack of true angina pectoris syndrome for as much as three years?

A. I know that it can occur, that is also from the study of patients.

Q. Now, Doctor, this angina pectoris syndrome arises from coronary insufficiency; does it not?

A. Yes.

(Testimony of Dr. Charles R. Wilson.)

Q. It's a symptomatic term and usually comes where there is a coronary insufficiency?

A. The very great majority of them are due to this, and to introduce the other percentage gets into medical problems.

Q. But for our purposes here, that would be a true statement? A. Coronary insufficiency.

Q. Now, coronary insufficiency arises when there is a narrowing of the lumen of the coronary arteries; is that true?

A. That is the major cause of coronary insufficiency, yes, [602] sir, it's not the only cause.

Q. Well, it is the cause you were talking about based upon the coroner's report of a diminishment of coronary—of the coronary arteries in this case?

A. No, you see, we haven't gone into all this yet, it's not entirely a true statement. It's true to the question I was asked, but it is not a complete statement yet.

Q. All right. Now, so far as the clinician is concerned, what are the things that make him suspect that there is a coronary insufficiency? When the patient comes to him or makes him investigate whether there is a coronary insufficiency?

A. There is one dominant symptom which we always must adhere to, if we are going to, and this is myself talking, that if we are going to adhere to proper medical investigation of a patient, and this is my teaching in the medical school, if a man presents himself and complains of a pain in his chest and frequently it goes into his arms, that is due to

(Testimony of Dr. Charles R. Wilson.)

coronary insufficiency until you prove it otherwise, and I will stand on that and talk that vigorously and hard many times this year.

Q. That is what I was going to come to next, Doctor, in other words, from the standpoint of treating your patients, a man who has a constricting pain in his chest and radiation down his arm, raises a strong presumption in your mind, you [603] teach it. you believe that that pain is the pain of true angina pectoris syndrome unless it is proven otherwise; is that correct? A. That is true.

Q. That is true. Now, in your investigation then, when you attempt to establish whether such a pain is or is not the pain, the true angina pectoris syndrome, what do you do, inquire more about the pain, the fellow says, I got a constricting pain in my chest, and I have pain down my arms?

A. Yes, obviously the history taking in this situation is the main diagnostic point.

Q. Now, then, for example, in other words, when—the reason that you take that history is that it is true that breathlessness and a coronary pain may be caused by disease in other systems of the body; isn't that the reason you do that?

A. Well, yes, you are trying to eliminate other systems, you're trying to positively put it in a place where you can properly advise your patient.

Q. Now then, of course, you can't open up the man—you can't open up the main coronary arteries and look at them while he is alive, can you, that is not a part of your diagnosis, is it?

(Testimony of Dr. Charles R. Wilson.)

A. No, that is not.

Q. So then, you have to go on his history and on the signs that he shows, medical signs; isn't that so, Doctor?

A. That's true. [604]

Q. Now, do you inquire—go back quite a ways into the man's history searching for symptoms, things that might help you in determining whether this strong presumption that you entertain has been overcome?

A. That is true.

Q. And you inquire into the past history, and one of the things you want to know is whether he has had symptoms of fatigue, whether he gets tired, you want to know that, don't you?

A. Yes, that's a very common symptom, however——

Q. It's an early symptom; isn't it?

A. An early symptom, Mr. Beebe, there are two common symptoms in my practice; they are fatigue and pain, and it doesn't make a great deal of difference. I have to analyze it, and the question of fatigue is a routine question, it is—it's running pain a very close second in my practice and in medical practice generally.

Q. Now, is it important to know whether the man had a history of frequent nausea?

A. Well, yes, Mr. Beebe.

Q. And whether he has had attacks which were attributed to indigestion, you want to know that too; don't you?

A. Yes.

Q. Whether he has ever had nosebleed or epistaxis, you want to know that too; don't you?

(Testimony of Dr. Charles R. Wilson.)

A. Yes, those are routine questions. [605]

Q. And you want to know whether he suffered any dizziness or vertigo, don't you, Doctor, that is a routine part of your examination?

A. Yes, every new patient, regardless of symptom gets this group of questions asked.

Q. You ask those questions when you suspect whether this man has had a pain that you suspect might be angina or which you assume is angina until it is proven otherwise, you ask those questions?

A. Those questions are asked then and there, asked when he comes in with just a plain stomach upset or a complete examination. They are part of a complete survey.

Q. And you ask him if he has coughing spells?

A. Yes.

Q. Whether he has ever coughed blood?

A. Yes.

Q. Whether he ever experiences a sensation of choking or distress, you ask those questions too; don't you?

A. Questions that are quite similar to that, they have the same notations; I don't say I use the same words.

Q. Well, now, I believe you said that the cardinal symptom of angina pectoris so far as you were concerned were fatigue and pain; is that correct, Doctor?

A. If my testimony says that I said fatigue and pain, I will stand on that, I don't recall that I said fatigue. [606]

(Testimony of Dr. Charles R. Wilson.)

Q. What are the cardinal symptoms of angina pectoris?

A. Well, angina pectoris is a pain in the pectoris region of the chest.

Q. What are the cardinal symptoms of coronary insufficiency?

A. Mr. Beebe, coronary insufficiency may have no symptoms.

Q. Well, how do you diagnose them in a live patient? A. Sometimes you can't.

Q. I understand that, but sometimes you do so diagnosis it, don't you? A. Yes.

Q. Well, what are the cardinal symptoms upon which you rely?

A. The cardinal pain symptom is a constricting pain to the chest with radiation into the arms.

Q. Is breathlessness a cardinal symptom?

A. No, sir. Now, I will explain this. I have heard this discussion in the court, too, in other testimony, breathlessness can be a sense of needing to take a breath, and is not dyspnea or labor or hurting in any sense of the word, and you ask questions if they were actually short of breath, and they say that they felt they had to breathe, and they say that it was not the shortness of breath, it was the tightness that bothered them, not the breathing, and indirectly they will call it a shortness of breath. In an absence of that symptom, you will find that it is not and it is one of these tightening band-like constricting pains in the chest or discomfort [607] because the heart

(Testimony of Dr. Charles R. Wilson.)

can be full of pain in the sense of a cut on the surface of the skin, when we are talking about visible pain, but in the heart or gallbladder, they are invisible sensations and for the whole of medical record, no one has ever been able to say anything except it's an indescribable deep pain. It is not like the pain we are talking about on the surface of the skin.

Q. I understand that, Doctor. Now, then, to sort of divide this then, the pain or rather the feeling is more or less that the patient has difficulty in finding words to describe it, isn't that so?

A. In the sense that he can describe a bug or a cutting or this sort of thing, you will have to experience them yourself to know what I am talking about; it is an indescribable thing, it is like a tightness, it's like I am in a vise.

Q. Choking, don't they sometimes say it's a choking type of pain?

A. Oh, I presume that it will—I presume patients will use the word "choking," but that is not in the sense of choking on something that you have swallowed or have in the bronchial tubes.

Q. Now then, the radiation of the pain, or the referring of the pain down the arm, does that usually follow the pattern of any particular nerve distribution? A. Yes.

Q. Which one? [608]

The pain reference from the heart area is referred up the autonomic nervous system, the sympathetic and parasympathetics, and this area is the area of the sympathetic nerves that come from the

(Testimony of Dr. Charles R. Wilson.)

neck region and the so-called cervicals, sympathetics, the neck sympathetics, the arm nerves come from the cervical area and the neck area from the fourth, fifth, sixth, and seventh vertebrae, come down through the fourth, fifth, sixth, seventh vertebrae, the same area that this parasympathetic nerve system comes down; now, from the peripheral region and the sympathetic system, it comes up still above and down the arm, or across and down both.

Q. Well, is there what we call the ulnar distribution of the nervous system in the arm or the ulnar distribution of the nerves in the arm?

A. Yes, if a patient with angina, and this is a very important part of an examination, it is not always true, I experienced it if you wish me to tell about it, but when you ask a patient about the pain in his arm, now where does it go in your arms? Well, it went down right down my arm, right out of my fingers. If he says down the arm and over the back of the hand and over in here (indicating) it probably wasn't angina, it was probably something else because if it didn't include the ulnar distribution, which is the first part of this chain of events, it wouldn't pick this part (indicating) the back of the hand or part of the thumb, [609] because those are two different nerves and it is going to take these two (indicating), the back of the hand and the thumb, and if it comes from the heart it's going to the little finger side of the palm also. This is just true, you don't get this part of the radial and medial nerve influence in this area, you get the ulnar system through here, and I recall something that

(Testimony of Dr. Charles R. Wilson.)

stands out so much in mind, that a patient with an anginal pain of long duration saying to me, if you would just get a pair of pliers and cut that off right there (indicating) I'd be eternally grateful, if you could just take and cut off the area where the pain is in they would be perfectly happy, maybe at the wrist or the hand, and I remember that one because the man died of coronary occlusion.

The Court: Well, already from—I gather from the testimony that there is no definite pattern that this may take?

The Witness: No, sir, there is no prediagnosible pattern, that's right.

Q. (By Mr. Beebe): Now, Doctor, it is true, is it not that pain which simulates heart pain may arise from the chest wall?

A. Yes, we have to be extremely careful in analyzing pain patterns in the chest area that we do not make errors and I have made those errors too often, and calling a pain in the chest area that I could demonstrate to my satisfaction and the satisfaction of my associates and even to medical students [610] that it was a muscular pain in the chest, and the patient developed a coronary occlusion.

Q. And the thoracic pain simulating heart pain may come from the cervical or dorsal spine; may it not?

A. I know of no cause of pain in the chest area arising in the cervical spine.

Q. How about the dorsal spine?

A. The dorsal spine can cause pain, and the pain

(Testimony of Dr. Charles R. Wilson.)

caused from the dorsal spine in the chest has its own peculiar nature.

Q. So you don't think, Doctor, that the pain arising from the dorsal spine can simulate heart pain?

A. By and large my answer would be no, I do not, which can be lucidated if we want to.

Q. Thoracic pain simulating heart pain might arise from any organ in the thorax, may it not, in the pleura, for example? A. No, sir.

Q. The lungs?

A. No, sir, the lungs are not painful.

Q. The esophagus?

A. The esophagus gives you a little trouble, there are ways of analyzing that pain, however, that makes it a little bit different than heart, and also I must call attention to the fact that when you have—when you're dealing with [611] visceral structures you have these visceral coronary reflexes and you can create a coronary insufficiency from coronary spasm, and this is one of the causes of coronary insufficiency that we did not go into, and I said we could go into them, and tell you the type of thing that the visceral structures with their reflexes are really a very live subject.

Q. Such a reflex in your opinion can come from the stomach? A. Oh, yes, sure.

Q. And affect coronary blood flow?

A. Yes, sir.

Q. To the extent that there would be sufficient

(Testimony of Dr. Charles R. Wilson.)

coronary insufficiency to produce ventricular fibrillation and death?

A. Yes, sir, I have seen this.

Q. In the normal heart or not?

A. Yes, sir, with no atheromatous deposits in that heart at all.

Q. This pain reflex and action upon the nervous system in your opinion is sufficient to bring about a nervous reflex which would produce an arrhythmia of the heart which is inconsistent with life and affect the coronary blood flow and cause death?

A. My answer will be yes, to that, if I may qualify it to this extent, that I am talking about visceral reflexes and this deep agonizing pain arising in visceral structures and are transmitted to the sympathetic nerve system in its [612] reflex mechanism, not pain arising on the surface of a body and going through the voluntary system, you may say, where you have another nervous system involved entirely that reflex is not nearly as well thought of and in my estimation not established at all.

Q. I see. Now, then, Doctor, isn't it true that usually the angina pectoris syndrome pain comes on on the exertion, at the height or peak of exertion?

A. The usual attack of angina pectoris is described as constricting pain to the chest which comes on during or immediately after exertion, but we all know that angina pectoris can occur in the horizontal position, it has, the important—angina diacubitus—this is a very well recognized cause of angina pectoris, I have to hypothecate as to why it

(Testimony of Dr. Charles R. Wilson.)

occurs, and I have my own opinions, being rather strongly opinionated, I am afraid, that a patient with angina can get a pain from walking into a cold wind. It is one of the striking factors of angina pectoris, and I think that by crawling into cold sheets, for example, he can also get a reflex and cause an angina pectoris. This is called angina diacubitus, that is well documented, and it may be the earliest sign of angina. Angina may occur in the patient before he has done any exertion at all, and I have found this in talking to doctors that I have seen this, and I have diagnosed this, and I know that it is in medical literature. [613]

Q. You are talking about walking into a cold wind. Now, is not the general medical opinion that it is the chilling that brings it on, a man walking in a cold wind, he gets chilled?

A. Oh, yes, you get chilled, and that acts through this autonomic nervous system by strong impulses on the blood vessels and they proceed in the way that you get the same old pattern of sympathetic reflexes to reflexes to the heart area.

Q. Now, the great majority of cases, however, Doctor, are cases, however, where the angina pectoris syndrome does come in where there is effort or after a heavy meal or something of that type; aren't those the great majority of the angina pectoris cases?

A. Oh, yes, sure.

Q. And as a matter of fact, don't most of your patients say, now this pain lasts a little while, it

(Testimony of Dr. Charles R. Wilson.)

goes away when I rest, whenever I have pain I stop and I rest and it goes away?

A. Yes, my instructions to the patients in that matter is not to take nitroglycerin but to stand still and look out the window until it has gone away, and usually the pain will be gone in maybe a matter of a very few seconds.

Q. As a matter of fact, angina pectoris pain is actually usually for just a few fleeting moments, never over fifteen [614] minutes; isn't that a correct statement?

A. No, that is not a correct statement, Mr. Beebe, in my opinion, and my instructions again to patients is that you may take nitroglycerine at 15-minute intervals for up to four doses, because something else may happen, we don't necessarily say that it will and it isn't necessary at all to happen, and I have patients take as high as three nitroglycerin tablets at a time and take them for as high as 24 to 30 nitroglycerin tablets a day, and they still have coronary insufficiency.

Q. Doctor, you do not agree that, "Angina pectoris persists for a few fleeting or slowly passing moments up to about ten minutes, never more than fifteen," that is from "Hermann, Diseases of the Heart and Arteries," page 36?

A. No, I cannot accept that entirely; I know Dr. Hermann's work and I know who he is.

Q. Do you recognize him as an authority?

A. Oh, yes.

Q. Now, Doctor, I believe you gave as your opin-

(Testimony of Dr. Charles R. Wilson.)

ion on direct examination that Mr. Lyons suffered from an aortic insufficiency; is that correct?

A. Based upon the autopsy report, I said that—I believe that he had an aortic insufficiency, yes.

Q. And that was based entirely upon the autopsy report? A. Yes, sir. [615]

Q. And what was in the autopsy report?

A. That he had a thickening and hardening of the aortic valves and that the primary cause of death was called—was attributed to aortic insufficiency. The person that did the autopsy said that it was aortic insufficiency.

Q. You based your answer then in part, upon the conclusion that he died of aortic insufficiency; is that correct, Doctor?

A. The mere fact that—yes. The mere fact that an autopsy surgeon would say that the immediate cause of death was aortic insufficiency is common usage in filling out any death certificate. We have to give a primary cause of death, and we will put that, aortic insufficiency as the primary cause of death in a patient, and the conclusion that the cause of death is aortic insufficiency is a statement that we see all the time in death certificates.

Q. Yes, and as you frankly said, you based your opinion that Mr. Lyons had an aortic insufficiency upon that conclusion; didn't you, in part?

A. On the conclusion that his death was——

Q. Due to aortic insufficiency?

A. Oh, Mr. Beebe, I don't think that I would like to convey that impression that I diagnosed

(Testimony of Dr. Charles R. Wilson.)

aortic insufficiency on the conclusion of the autopsy, whether death was due to it or not.

Q. Did I understand that the prior questions that you answered in which you stated it was quite a common practice [616] to accept a finding of aortic insufficiency, and that you stated that your reasons for that was that the man who performed the autopsy made a diagnosis of aortic insufficiency and that you relied on it, didn't you mean to say that, Doctor? A. Yes, I did, yes.

Q. Now, Doctor, leaving aside the conclusions there that he had an aortic insufficiency, all we have in the factual finding is that the aortic valves were thickened and hardened with atheromatous deposits.

A. That's true.

Q. Now, isn't it true, Doctor, many men have some thickening and hardening of atheromatous deposits without having an insufficient aortic valve—I misspoke myself. Isn't it true that many men have thickening and hardening of the aortic sigmoid valves with atheromatous deposits who have a sufficient aortic valve? A. Yes.

Q. Now then, as a matter of fact, Doctor, what are the signs, clinical signs of aortic insufficiency?

A. Mr. Beebe, we have had—I hope I am not out of order in stating it this way, I have had the classical description of aortic insufficiency by Dr. Chamberlain and Dr. Rush, and I have nothing to add to their classical descriptions of major reasons of aortic insufficiency, and I will recognize [617] and accept that I should be able to sit across from a

(Testimony of Dr. Charles R. Wilson.)

person and see his veins pulsating in and out in his neck vessels and diagnose that as aortic insufficiency just by inspection. Aortic insufficiency also happens to be one of the most commonly missed diagnoses that we have, and I give you a clear-cut example of this in some recent examinations which I was conducting, helping conduct for the American Board of Internal Medicine, finding——

Mr. Beebe: Your Honor, I don't think that this is now responsive to my question.

The Court: Well, let the doctor go ahead as long as you are conducting a clinic we might just as well go the full way.

The Witness: This has to do with the degree of aortic insufficiency, and symptoms of it in which this applicant, who has fulfilled all of his training and comes before the board for certification of the American Board of Internal Medicine, appears and cannot hear or does not hear, or I don't know which it would be, that is audible, it happens to be that which we would term Grade 1 which is the smallest degree that you can hear. This is also significant, a significant degree of aortic insufficiency, there are no sounds, they are very hard to hear, and they have no particular outward symptoms that you can find, but on exertion they increase and they cause symptoms.

Q. (By Mr. Beebe): Now, that's where it is really just a [618] mild degree? A. Yes, sir.

Q. Now, a man that has been strapped in a chair playing a marlin for 30 minutes, you think that

(Testimony of Dr. Charles R. Wilson.)

would be enough exertion to bring out this slight insufficiency and bring on some symptoms?

A. Not necessarily.

Q. In other words, Doctor, as I understand your testimony, it boils down to this, that as able as our doctors are, sometimes they miss on diagnosing coronary insufficiency; sometimes they miss on diagnosing aortic insufficiency; is that fair?

A. Yes, sir.

Q. Doctor, getting back to the cystic duct or—just a moment—do I understand you to say that there is no nervous system between the sphincters at either end so that there is no pain while it is in the center of the duct?

A. No, I didn't imply that.

Q. You said there was no pain.

A. I didn't mean no pain.

Q. You said there was no pain after it got by the first sphincter until it hit the second sphincter in the common bile duct.

A. If I am correct, I said that there was no pain from stones in the common duct, stones lying in the common duct, and the common duct can contract over there and there is no difference, [619] so that you have pain at the outlet.

Q. I am talking about the cystic duct.

A. Yes, sir, I was talking about the ducts, the sphincters are subject to the same influences.

Q. Are those the only nerves that are capable of transmitting pain, those at the gallbladder end and the other at the common duct end?

(Testimony of Dr. Charles R. Wilson.)

A. No, that is not true, Mr. Beebe, we have degrees of pain and the painful areas are these sphincteric mechanisms or muscular adaptations act as places to hold, as I said, at the end of the esophagus into the stomach, the outlets from the small intestine into the large intestine, and went through a number of other things where these pass, there are other places where you don't have much pain or you could have pain between it, but I don't think it would be as great as at the outlets.

Q. Well, those other little nerves that are attached to the sphincteric muscles, are not connected to the cystic duct or the common duct, in your opinion?

A. No, they don't fall in these same lines as the adaptations that have been developed.

Q. Doctor, what is the basis of your opinion?

A. Your Honor, might I have a drink of water?

The Court: All right. Well, I think we will take a recess, gentlemen, and give an opportunity to go over your notes. [620]

Mr. Beebe: Yes, sir.

(Whereupon, a short recess was had.)

The Court: Proceed.

Q. (By Mr. Beebe): Dr. Wilson, from the autopsy description, can you tell how thick the aortic valve, Mr. Lyons' aortic valves were? A. No.

Q. Can you tell how hard they were?

A. No.

(Testimony of Dr. Charles R. Wilson.)

Q. Can you tell the extent of the atheromatous plaques on it? A. No.

Q. Doctor, a few minutes ago you mentioned a Grade 1 murmur that is elicited in the case involving the aortic, was that murmur that he had a diastolic or a systolic murmur? A. Diastolic.

Q. Now, this angina that comes on when a person is lying down that you testified a while ago about, Doctor, what is the physiology of that that brings on that pain?

A. I gave one explanation which I have used in my own thoughts; that is the opinion, and the opinion which I hold quite strongly that cold sheets, chilling procedure can produce this type of thing in getting into bed, it also occurs as angina diacubitus can also occur during sleep and some of these may be related to what we call exertional dreams, and [621] the patient may dream that he is running or exerting himself and does go through the procedure of exertion and have his pain pattern develop as this. There are many times in which we cannot describe an exertion or a particular mechanism, and we have to assume that this dream does not break consciousness, and this is not at all a wrong assumption, because we know that all—that all dreams do something or other, and the important thing is that it doesn't ever—the dream doesn't get to the conscious level and yet the whole experience, the whole exertion pattern can be followed.

Q. Well, then, in other words, although the man isn't really exercising, he dreams that he is and

(Testimony of Dr. Charles R. Wilson.)

therefore his heart action steps up and doesn't get enough blood? A. Not at all, Mr. Beebe.

Q. Go on.

A. The feeling of an activity brings into play the muscles that you use in exercising that activity, and if you want to relax just stop thinking of doing anything while you relax; if you want to stop dreaming, you just stop your dreaming; if you want to stop thinking, you stop trying to form words to yourself and you will relax. This is a distinct activity, and it can be a very severe one and the bed can be quite smooth or it can be entirely torn up, and it is a result of these activities that are developed, and it is not an imaginary one, it's accompanied by use of [622] muscular activity.

Q. In other words, exertion?

A. It would be an exertion.

Q. While he is in bed or while he is laying down? A. Yes.

Q. Could that be caused because if a man is lying still, especially if he—the sheets are cold or if he is cold and has a reduction of coronary flow similar to what takes place in shock? In other words, the blood just simply doesn't get back?

A. Excuse me for smiling, but I was thinking about the getting into the cold sheets, I will have to——

Q. Well, what I mean is, what would happen to a person lying perfectly still and not moving at all, would there be an intereference with his blood flow; could it drop back to the point where there would

(Testimony of Dr. Charles R. Wilson.)

be an interference of coronary flow and bring on a pain actually from lack of any activity?

A. Well, I think I could say yes to that, that would be another cause.

Q. One more question. Could a man have an incident of chest wall pain and then later on have a pain that was true angina? A. Well, certainly.

Q. After a period of three years?

A. Yes, certainly.

Mr. Beebe: That's all, Doctor. [623]

Redirect Examination

By Mr. Kriesien:

Q. Doctor, what has been your experience, if you have had any, with reference to attacks of angina pectoris following heavy eating, what is the reason for it and what is the frequency of the occurrence?

A. It is one of the common presiding or precipitating causes of angina pectoris. The reason that is used is this—by the reasoning that is used in this regard is that when you have eaten and put food into the stomach, there is a call for blood to digest this, so there is a call for secretions from the stomach to digest this food, therefore, you have to increase the blood supply to the stomach to get that flow of secretions, that means that the heart has to put out more blood, has to get more blood to the stomach for the secretions to digest the food. This is estimated by various means as being 40 to 50 per cent above the amount of blood that is required at rest condi-

(Testimony of Dr. Charles R. Wilson.)

tions or before eating conditions and that is one of the mechanisms. Now, the digestion of the stomach, and that is another one, and we have started going into our visceral regions through the nervous system again, and this one, I will admit is a rather important one from heavy overeating or descriptions of tremendous exertion, and puts other factors in there, but the actual mechanics of eating causes an increased demand upon the heart to do a job of [624] work.

Q. And does exertion on top of this demand by reason of the eating, at that time, have an increased demand? A. It does.

Q. Now, Doctor, I will ask you whether or not you have an opinion as to whether a reflex from a gallstone passing through the cystic duct sphincters is or is not the more probable precipitating cause of the ventricular fibrillation and death in this case, than a fear reflex coupled with some pain reflex which might arise by virtue of a discharge of a shotgun close to the face and infliction of superficial injuries in a man of the temperament and experience that you have heard described of Mr. Lyons?

Mr. Beebe: I object to the question on the ground and for the reasons that the witness testified that it was impossible to cause pain, he has already answered.

The Court: You may answer, but let's get on with it.

The Witness: I think that would be probable and a possibility.

(Testimony of Dr. Charles R. Wilson.)

Q. (By Mr. Kriesien): By that, you mean the gallstone pain reflex? A. It is.

Mr. Kriesien: That's all.

Recross-Examination

By Mr. Beebe:

Q. Doctor, do you know if there was a gallbladder attack [625] at all in this case?

A. The finding of a gallstone in the cystic duct, I have testified means that the stone had to pass from the gallbladder in the cystic duct, I don't believe they form there—I don't believe it came back therefore, I think my answer would be yes, there had to be a gallbladder attack for that stone to pass from the gallbladder into the cystic duct.

Q. How long before Mr. Lyons' death did that stone pass into the position where it was found?

A. I have no way of knowing how long it took to get down to where it was.

Q. Now, if that had taken several hours, for example that morning, wouldn't you have expected that he would have had some severe gallbladder symptoms?

A. No, sir, Mr. Beebe, I do not have to have gallbladder symptoms, because the thing I am thinking and basing my opinion on is an impact, and this impact of a stone passing this sphincter supersedes the recognition of pain in the same sense that you touch a hot stove with your finger, and you recognize pain, this impact is so hard and the reflex is so fast that it gets into the nervous system and can

(Testimony of Dr. Charles R. Wilson.)

cause a fainting reaction before you can even have recognition of pain. It is the—exactly the same thing as the fainting reaction of approaching a person with a needle, or he takes a look at some blood, or you tell him something unfavorable, [626] and he goes out, and it supersedes the recognition of pain, and this is an impact and is a nervous reflex to the muscle that is faster than pain recognition in consciousness.

Q. Well, the man had not complained of any pain at all that morning, as a matter of fact he commented on how good he was feeling and the evidence, I think shows that within two, three, four, or five seconds before the last shotgun shell was exploded, that he shot and killed a dove. Is it your opinion that that stone caused that pain between the the first and second shotgun blasts?

A. Mr. Beebe, you remember I have just said that I do not have to have pain to have cause, but the way I can recognize it, is from reading this a number of times and thinking about it a great deal, and my opinion is based upon the findings, and not upon the recognition of pain, and it gets into one of these reflexes that we all have seen medically, of telling a patient an unfavorable thing, and have them straighten out like this (indicating) and go into stertorous breathing and even into convulsions right there while you're talking to them, and have to pick them up and put them on a table. This happens often—that they do not have a chance to reason or

(Testimony of Dr. Charles R. Wilson.)

to recognize—this is what I have tried to keep away from—the use of the word “pain” and call it impact. Because it is an impact, and it is transmitted to the nervous system extremely rapidly, and you get a fainting reflex, [627] from this we go into it deeper and describe it in detail from a neurological standpoint, but we believe they can happen.

Q. Doctor, perhaps I misunderstood you concerning the agonizing pain that would take place when this gallstone passed through, and I will ask you again what you said about it?

A. I said it can cause pain passing through the sphincters, one of the agonizing pains from the impact and the fainting can come before he could recognize pain.

Q. Before he could recognize pain. Well, Doctor, do you mean that this reflex that we are talking about takes place before the gallstone passes through that sphincter, either sphincter of the cystic duct, this reflex which would cause him to faint?

A. No, it's the impact of a stone in that sphincter.

Q. In that sphincter? A. Yes.

Q. And as I understand, it's your belief that that reflex is so fast that he never feels the pain?

A. That is my opinion in this case, that it was faster than the recognition of pain. He does not have to have had a consciousness of pain, everything is—excuse me.

Q. Now, what in your opinion caused this gall-

(Testimony of Dr. Charles R. Wilson.)

stone to suddenly move from the gallbladder through the sphincter?

A. I have no opinion as to why this gallstone or any other [628] gallstone decides to go from the gallbladder into the cystic duct, I have no way of knowing.

Q. Now, Doctor, if we assume, if we accept your premise that this gallstone was in the gallbladder before Mr. Lyons' death, and did not get into the cystic canal until the instant of his death, is it possible that a man dying an agonal death the stone would be forced through the cystic duct?

A. Yes.

Q. That would happen?

A. In my opinion, that could happen.

Q. And if that happened, there would be no signs of the passage in the common duct or the cystic duct either?

A. This would not appear inasmuch as it is like a marble and should go through without any mark at all.

Q. Then in your opinion in this regard, Doctor, is it necessarily based upon an assumption that the gallstone was in the gallbladder up until just the instant before the fatal incident, otherwise there could not have been that impact?

A. That's true.

Q. Now, the one that you talked about awhile ago, the one centimeter stone that you found on autopsy, did you know that that stone was in the gallbladder before the man's [629] death?

(Testimony of Dr. Charles R. Wilson.)

A. Well, no, I——

Q. You assumed that?

A. Well, I have to by my reasoning, and all the more by my testimony, and I believe that it had to be there but to say that I know it was there, I didn't see it there, but my reasoning would say that I believe it was there.

Q. You assumed it?

A. It was my opinion that it was there, or else it couldn't have gotten to the cystic duct.

Q. But is it possible for the existence of a stone in a gallbladder to be diagnosed by X-ray or otherwise?

A. That's right.

Mr. Beebe: That's all, your Honor.

Mr. Kriesien: No further questions of the witness, your Honor.

The Court: You may be excused, Doctor, thank you.

Mr. Kriesien: May the doctor be excused from further attendance if he so desires?

The Court: You may be excused, Doctor.

(Witness excused.)

Mr. Kriesien: And at this time, the defendant rests, your Honor.

The Court: The defense rests.

Mr. Beebe: We have some short rebuttal, your Honor. [630] I would say that it would not take over half to three-quarters of an hour.

The Court: All right.

Mr. Maguire: Now your Honor, I have just

(Testimony of Dr. Charles R. Wilson.)

been informed that I am to be called upon to be present in the Circuit Court at one o'clock, and I think it will not take over 20 minutes, but I would appreciate it if we did not take up until two o'clock today.

The Court: Ordinarily I don't recognize State courts, but you are a master of the Bar here, so I will accede to your wishes.

Mr. Maguire: Thank you very much.

The Court: The Court will recess until two o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.)

The Court: Proceed.

Mr. Maguire: Call Dr. John Raaf. [631]

DR. JOHN RAAF

was thereupon produced as a witness on behalf of the plaintiff herein and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maguire:

Q. You are Dr. John Raaf? A. I am.

Q. Are you a duly licensed and practicing physician and surgeon in the State of Oregon, Doctor?

A. Yes, sir.

Q. Doctor, what are your educational qualifications?

(Testimony of Dr. John Raaf.)

A. I went to medical school at Stanford University and I graduated in 1929. After that I went to Rochester, New York, in the school of medicine and dentistry and spent two years in the department of surgery. Following those two years, I went to Mayo Clinic and I finished the ensuing five years in the department of general surgery and neurological surgery. In 1936 I came to Portland.

Q. Doctor, do you have a specialty in the practice of medicine? A. I have.

Q. What is your specialty?

A. I specialize in neurological surgery.

Q. Are you certified by any American board in that specialty, Doctor? [632]

A. I am certified by the American Board of Neurological Surgeons.

Q. Did you say, Doctor, how long you had practiced that specialty in Portland, Oregon?

A. Yes; I practiced in Portland, Oregon, a little more than 19 years.

Q. And, Doctor, are you on the staff of any hospitals here in Portland?

A. I am on the staff of the Good Samaritan and St. Vincent's Hospitals and the University of Oregon Medical Hospital and Portland Sanitarium Hospital.

Q. Doctor, do you have any connection with any medical school as a teacher or professor?

A. I am head of the Division of Neurological Surgery at the University of Oregon Medical School.

(Testimony of Dr. John Raaf.)

Q. Dr. Raaf, can arthritis, spinal arthritis cause constricting chest pains with radiations down the arms which simulate the pain of coronary disease?

A. I think that it can.

Q. In your practice have you seen such cases?

A. I have.

Q. Is it a fairly common thing? A. Yes.

Q. Doctor, have you ever, in your experience, had such a case in which there was a previous diagnosis of coronary [633] disease?

A. Yes; I am sure that that is true, I haven't my files here, but I see it on frequent occasions that a patient will have the diagnosis of suspected coronary disease and turn out to be arthritis with a radicular type of pain in the chest and in the arms.

Q. Doctor, how does the arthritis cause such pain?

A. Well, usually there is an inflammatory reaction started in the arthritic joint and that may cause the neuritis in the nerves that go to the chest or the arms or there may be actually an impingement or pressure on the nerves to those areas that is causing the pain.

Q. Now, Doctor, are there any other causes within your field which commonly produce pains in the chest and arms which simulate coronary disease?

A. Yes; anything that causes pressure on the nerves that go to the chest wall or to the arms can produce pain which simulates coronary disease. For example, the spinal cord tumor or what you call a protracted intervertebral disc and even an inflam-

(Testimony of Dr. John Raaf.)

inflammatory reaction in the nerves to the areas that is in the chest and arms and can produce this pain which simulates the pain of coronary disease.

Q. Will you explain in a little more detail what you mean by an inflammatory process of the nerve roots?

A. Well, inflammatory process is a process, an infectious [634] process, the focus of the infection may be somewhere else in the body, and the focus of the infection maybe can tell us it is gallbladder disease or any other place in the body where there is infection. The infection may be disseminated by the blood stream and affect nerves in the various parts of the body.

Q. Are there any well-known situations of that kind, for example that are well enough known to have been known as a syndrome?

A. Oh, there is Guylliam-Boarre, maybe I could spell it, G-u-y-l-l-i-a-m hyphen B-o-a-r-r-e (spelling).

Q. And what is the cause of that syndrome, Doctor?

A. It's—this syndrome generally follows an infectious spot on the body and is thought to be a virus infection spreading to the nerves.

Mr. Maguire: You may cross-examine.

(Testimony of Dr. John Raaf.)

Cross-Examination

By Mr. Kriesien:

Q. Dr. Raaf, is this condition of which we have been talking, the arthritis, a progressive condition?

A. Usually arthritis is progressive, but the pain from arthritis is not necessarily so.

Q. I see.

A. We frequently see a patient with pain which we feel certain is due to arthritis and then for some reason or other, [635] possibly the subsidence of the inflammatory reaction around the arthritic areas the pain will disappear and the patient will have no more complaints.

Q. Have you ever had a case where a man has had no complaint of an arthritic condition, and afterwards was hurrying across a lumber dock and was seized with constricting chest and arm radiation pains to the extent that he could not hold a telephone without having had prior symptoms of an arthritic condition?

A. I don't know whether I have heard of exactly similar cases where a man was hurrying across a lumber dock, but it seems to me that that would not be out of keeping with an arthritic condition. Pains from arthritis come and go for no known reason.

Q. Well, without ever having had any past history of an arthritic condition, do you believe that it is possible that you would have chest and arm radia-

(Testimony of Dr. John Raaf.)

tion pains from hurrying across a lumber dock to the extent that an individual couldn't hold a telephone?

A. May I answer that this way: I know from personal experience that two or three years ago I was having some pain at intermittent intervals and I myself wondered, well, could this be coronary coming on, but I had never had any signs of heart disease, so I didn't even bother to have an electrocardiogram run, but these pains would occur at various intervals, [636] and it wasn't until a horse fell on me that I had an X-ray and knew that I had a little arthritis. Now, would that example answer your question? Does it answer your question?

Q. No; it doesn't, Doctor. My question is whether, without any past history of an arthritic condition, that you would be struck with such chest and arm radiation pains that you couldn't hold a telephone?

A. Well, I think that is entirely possible.

Q. Now, Doctor, would that individual be able to go on for a period of three years and then have an attack of the constricting chest and arm radiating pains when he was lying in bed?

A. I think so.

Q. Now, would that condition manifest itself in an individual engaged in rather excessive physical exertion in fighting a marlin weighing approximately 200 pounds for a period of a half hour where he was pulling back and forth and swinging around, would that arthritic condition manifest itself then?

(Testimony of Dr. John Raaf.)

A. I assume you mean that he had the arthritic pains some years before and then——

Q. Now, I will repeat that again; four days before that he had chest and arm radiation pains and then four days later engaged in strenuous activity, would he do that without pain?

A. Well, arthritic pains come and go with some irregularity. I think he could have had, sometimes persons have arthritic [637] conditions, and then they can even engage in rather severe activity and it would not produce the same thing.

Q. These pains can also come from a heart condition, can they not?

A. Pains to the chest and arm can come from heart condition.

Mr. Kriesien: That's all.

Mr. Maguire: I have no further questions, Dr. Raaf.

The Court: You may be excused, Doctor, thank you.

(Witness excused.)

Mr. Beebe: Mr. Maguire has gone to look for another witness, your Honor, I am sorry about the delay, your Honor.

Mr. Maguire: Both the witnesses have already left their offices before I called.

The Court: All right, we will be in recess until they come.

(Whereupon, a short recess was had.)

The Court: Proceed.

Mr. Maguire: We will call Dr. Rush back to the stand. [638]

DR. HOMER P. RUSH

recalled as a witness on behalf of the plaintiff on rebuttal, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Beebe:

Q. Doctor, yesterday, we had some testimony with respect to the question of radicular pains coming from arthritis, and without repeating what that testimony was, have you had any experiences in your practice where a person was having pain, radiating arm pains, come in for treatment and you discover another source of those pains?

A. I have.

Q. Has that been often?

A. I would say very frequently.

Q. Have you been able to determine what the cause of those simulating pains was?

A. We have in many of the cases, we have in some of them, that we couldn't but I think in a good percentage we have.

Q. And those persons who have those simulated pains, do they have any particular occupational physical work that—to which they are quite often associated?

A. Well, I suppose being a teacher, it's hard for me to answer yes or no. If the Court will permit, I would rather give a little discussion on chest pain,

(Testimony of Dr. Homer P. Rush.)

because I think it will point it out much [639] better.

Q. All right, go ahead.

A. The general diagnosing of a chest pain has been a problem that has been studied quite considerably for the past many years and there have been many, many articles written on it. I think it's fair to say in my own patients, my work being largely cardiology, that the big majority that come to me and most of them are referred from other doctors, come because it's thought they had heart pain, and the majority do not have heart pains. It's usually some other cause. There are many occupations that will predispose to getting chest pain, one type or another. A chest wall pain, which is wall hypertrophic arthritis of the spine or radicular irritation of the intercostal nerve, is quite a common source of pain among stenographers, among truck drivers, cowboys that are riding the range and on a horse, and probably the greatest occupational factor on left-sided pain are dentists, of course it is quite obvious to understand why because the right-handed dentist always works on the right side and he always leans toward the left, and any dentist that has done that type of work over 15 years or so will get left-sided pain, and it will come out on the side of his chest from the nerve endings there.

Q. Now, what, on the arthritis itself, have you known and observed instances where the syndrome of chest pain and radiating down the arms have been caused or due to arthritis and not to any dis-

(Testimony of Dr. Homer P. Rush.)

ease or any abnormality of heart structure? [640]

A. I have. In fact they—that I am speaking about with the dentists due to the hypertrophic arthritis that develops.

Q. Is it from the history given by the patient as to the nature of the pains, is that of the same or characteristics as coronary pains?

A. Usually not, I think one would have to again explain that in a little more detail. Typical anginal pain is one type of pain. Coronary insufficiency is another type of pain. Coronary thrombosis is another type as regards its characteristics. Now, there are many cases that are not typical.

Q. Any of these three?

A. Now, typical anginal pain differs from radicular pain or hypertrophic arthritis of the spine and is quite easy to determine, but again there are many of them that are not typical and they demand a lot of investigation. In my own office, we have a pain sheet worked up that is a matter of the patient just keeping on answering these questions, and I think there are four typewritten pages, in other words, there are many factors that one has to go into on chest pain. Does that answer your question?

Q. I think it does; yes. Now, with regard to the reflex in the sympathetic or parasympathetic nerve system, either from pain in some other part of the body or from anger or fear or any strong emotion, what is the mechanism of that [641] reflex, precisely what happens as far as medical science knows it?

(Testimony of Dr. Homer P. Rush.)

Mr. Kriesien: If the Court please, I will object to that question. It has been testified to previously.

The Court: I think that has been gone over before.

Mr. Beebe: Very well, I will be glad to withdraw it.

Q. (By Mr. Beebe): Doctor, with respect to gallstones as I think you call it colic?

A. Gallstone colic is the term, yes.

Q. Have you ever heard or have you ever read of any person who has had a coronary insufficiency brought about by the pain of gallstones?

Mr. Kriesien: If the Court please, the same objection that it has been gone into before.

The Court: Asked and answered. Sustained.

Mr. Beebe: That's all.

Mr. Kriesien: No cross-examination.

The Court: You may be excused, Doctor.

The Witness: Thank you.

(Witness excused.)

Mr. Maguire: Dr. William Lehman. [642]

DR. WILLIAM LEWIS LEHMAN

recalled as a witness on behalf of the plaintiff on rebuttal, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Maguire:

Q. Referring to the structure, Doctor, of the cystic canal which is, as I understand it, from the gallbladder to the common gall duct, is there more than one valve in that channel?

A. It is a system of valves that one might consider it as one valve, but it is a spiral valve which begins at the outlet of the gallbladder and pretty much extends down to the point of its junction with the common bile duct.

Q. Now, have you ever known or do you think it physically possible for a gallstone of one centimeter in diameter to be forced through the common—the cystic duct?

Mr. Kriesien: Objected to on the ground that the question has been asked and answered.

The Court: Well, I will allow this question, but don't get in the field of repetition.

Mr. Maguire: I am trying not to, your Honor.

The Witness: Would you repeat the question, please?

The Court: Read the question, Mr. Reporter.

(Question read.)

The Witness: As I understand the question, can

(Testimony of Dr. William Lewis Lehman.)

a gallstone pass through the cystic duct from the gallbladder to [643] the common duct, can that happen?

Q. Of one centimeter in diameter?

A. A one centimeter can pass through that duct, yes, sir.

Q. And if it does so, what is the necessary pathological effect?

A. Such a stone, one centimeter in diameter which is slightly less than half an inch in diameter would produce in its passage through the duct, considerable trauma or injury to the lining of the cystic duct. The duct is normally three millimeters in diameter, which is one-eighth of an inch, and a centimeter stone is a ten-millimeter stone or three times the normal diameter of the cystic duct, so that in passing through, certain tissue structures would have to be torn and traumatized.

Q. Would those be observable in autopsy?

A. Yes.

Q. Would it be correct to say that there is not enough elasticity of the wall of that duct to permit the passage of such a stone without doing damage to the tissues? A. I believe so.

Q. Now, there has been in this case, there has been some mention of aortic valves that were thickened and hardened, aortic valves which were covered and cemented with atheromatous plaques, do you have here in the courtroom an example of each one of that kind? A. Yes; I do, sir. [644]

Q. Are they mainly observable by non-technical

(Testimony of Dr. William Lewis Lehman.)

eyes? A. I am sure they are.

Q. Do you have them there in that dish, Doctor?

A. Yes, sir.

Mr. Maguire: May I approach the witness, your Honor?

The Court: Yes.

Mr. Mize: Your Honor, I'd like to make an objection at this time to this line of questioning on the ground and for the reason that this matter has all been gone into in their case in chief and has been testified to at great length by Dr. Chamberlain, by Dr. Rush, and by their other experts, as a matter of fact, we have had charts of hearts in this case in their case in chief. I do not think it is proper rebuttal testimony.

The Court: I think you are probably right, but I want to see what the doctor has there.

Mr. Mize: May we approach, too, your Honor?

The Court: Yes, certainly; you might as well look at it.

The Witness: The object here is a human heart. The heart is perhaps distinguishable only from an ox heart or a calf heart by some minor changes in its anatomy, and in order to orient your Honor, I would like to have you see this; this is the right side of the heart (indicating) where blood enters into it, and the left side of the heart where [645] blood leaves. Now then, the aortic semilunar valves are the valves at the exit from the main pump on the left-hand side of the heart and they are three in number, and they are all semilunar valves, and they

(Testimony of Dr. William Lewis Lehman.)

have an edge, they are called cusps, that is because they do have a cup-like edge or cup-like formation in their anatomy. Now, inasmuch as they, when put together close off the return flow of the blood because the column of blood which would be forced backward because the blood is flowing forward, would tend to flow backward, but that in so doing would strike upon the cusps forcing it to the center of the openings, and the three then meeting each other in the center of the channel would restrict any back flow of blood. That is the function of these valves. Now, these valves have actually some hardening and some thickening obviously, they are here to demonstrate for that purpose, and this hardening and this thickening due to the plaque-like deposits of the calcium and what we call cholesterol, a harder substance——

The Court: How old was the individual who once owned that heart?

The Witness: This individual was 46 years old. This valve now then, is somewhat changed from normal because of hardening of the artery situation, the aging process which affects all of us. This valve in particular is stiffened and hardened as to a degree and in order for you to see what [646] would happen in a normal heart, it would be someone like this, very thin tissue paper-like structure which operates as a valve for another portion of the heart, but I would like to point out that although these valves are hardened and they are stiffened to a degree, they are nevertheless competent and this person did

(Testimony of Dr. William Lewis Lehman.)

not have, as we could determine or as we could detect from the medical history, he did not have any anginal pain.

Q. Does that mean that the valve was not doing its work or what?

A. No; it means that this valve system, this aortic semilunar valve system actually is a competent and functional one and did its job.

Q. Does that valve that you have been talking about, does that—

Mr. Mize: May it please the Court, I would like to interpose an objection that any testimony here as to the condition of this heart, belonging to somebody else is certainly not important to this case.

The Court: Well, purely the object of the doctor's testimony is for the purposes of illustration. Overruled.

Q. (By Mr. Maguire): Now, does that valve that you are talking about, does that have atheromatous deposits on it? A. Yes, sir; it has.

Q. Will you show it to the Court? [647]

A. They are these yellowish firm plaques which are hardened. This structure it is—I can flick it with my finger, and it gives a hardened firm consistency which is abnormal, it is an aging and wear and tear process, and it should be more like this valve, which is soft and moves easily.

The Court: More flexible?

The Witness: Indeed, correct.

Q. (By Mr. Maguire): Now then, do you have

(Testimony of Dr. William Lewis Lehman.)

a heart valve, an aortic valve which is covered and cemented?

A. Yes; I do, and it is entirely different. This now represents from another heart this same area but in a patient who had an entirely different character to his heart valves. Here there is considerable deposits of calcium or stone and fibrous tissue and yellowish cholesterol again, and you will notice that there is no flexibility whatsoever, and he has the deposition actually of rock-like material and his only opening through this system is by means of that small slit. This is hard-like, cemented valve system and this is one that is hardened or stiffened.

The Court: All right, let's put Yorick away now for a while.

Q. (By Mr. Maguire): Now, with the aortic valve in the last example, would that be a competent valve? A. No, sir.

Q. Why not? [648]

A. Because it is no longer flexible, it is completely changed. The valves are fused, they have deposits of calcium and other carbohydrates and stones and this is a strictly incompetent valve, which produces certain changes in the heart as a result of this involvement.

Q. And would that cause aortic insufficiency?

A. This is a stenosis. Primarily this is a stenotic heart valve and as such, insufficiency, if any, is a minor change.

Q. And is the first one you showed, would that bring about aortic insufficiency?

(Testimony of Dr. William Lewis Lehman.)

Mr. Kriesien: If the Court please, I would like to object to that as being incompetent, irrelevant, and immaterial.

The Court: That has been gone into, Mr. Maguire, I don't think I can become enlightened any further than I am on that.

Mr. Maguire: Very well.

Q. (By Mr. Maguire): Now, assuming that you had a gallstone of one centimeter in diameter, could that be—and assuming that it could get through the cystic canal, would that be a matter of considerable length of time or a short length of time, seconds, or what?

Mr. Kriesien: Your Honor, I object to that on the ground and for the reasons that that was gone into in their case in chief, and I would like the further objection on the ground and for the reason that that was brought out by Dr. Rush, [649] he described the heart, pointed out the position of it, he pointed out the passage of the gallstones.

The Court: Objection sustained.

Q. (By Mr. Maguire): Assuming that there was a gallstone of one centimeter in the common gall duct, would the transportation—and that was the common duct or rather the common gall duct and the cystic duct—what do you call the whole thing—assuming that there was a gallstone of one centimeter in size which is in the common gall duct and the body was of a deceased, was transported over a very substantial number of miles, I have forgotten

(Testimony of Dr. William Lewis Lehman.)

the number of miles, I think it is 30 or 40, over rough roads, what can you state as to the likelihood of the position of that gallstone being changed from the position which it was in at the time of death, either to bring it up closer to where the cystic canal joins the common duct or vice versa?

Mr. Mize: Your Honor I object to that question on the ground that this was all a matter of their case in chief and is not a matter of proper rebuttal testimony.

The Court: Do you want to be heard?

Mr. Maguire: Yes, your Honor; the defense, at least part of the defense is from one witness that the position in which the gallstone was found at that junction is itself significant from Dr. Wilson's testimony, and certainly this is in rebuttal to that. [650]

The Court: All right, I will allow the question.

The Witness: As I understand it, you would like to know what the position of this gallstone means in regard to any change or shifting of the body after death?

Q. (By Mr. Maguire): Yes.

A. It is possible that this gallstone could have moved up or down in the common bile duct, and it is possible that it could also have been forced back into the cystic duct or the common duct, particularly since the autopsy indicates that this was found at the junction of the two ducts.

Mr. Maguire: That is all.

Mr. Mize: No questions, your Honor.

The Court: Thank you, Dr. Lehman, you may be excused.

(Witness excused.)

Mr. Maguire: I would like to ask Mrs. Lyons one question. Will you take the stand, please? [651]

JANE S. LYONS

recalled as a witness on behalf of the plaintiff on rebuttal, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Maguire:

Q. I might say that this was a matter that was not known to us until yesterday. Mrs. Lyons, about the time or shortly earlier, did Mr. Lyons suffer any injury to his spine?

A. Before we were married he had had an injury to his spine in a mill accident.

Q. And was it of any substantial extent?

A. I beg your pardon?

Q. Was it of substantial extent; did it affect the whole spine?

Mr. Mize: If the Court please, I don't believe that this witness is qualified to state as to whether it affected the spine.

The Court: No; you may describe the nature of the injury, Mrs. Lyons, if you will, as you remember it.

Q. (By Mr. Maguire): And the nature of the

(Testimony of Jane S. Lyons.)

accident, if you will be so good—if I may add it.

Mr. Kriesien: And that she knows this of her own knowledge.

The Court: I am assuming that you weren't there when the accident happened? [652]

The Witness: I was not.

The Court: Can you describe his physical condition after the accident?

The Witness: The accident was prior to our marriage, and how many years before, I really don't know, but it was an injury which involved his having been caught in a piece of machinery.

Mr. Mize: Now, your Honor, I would like to object to that answer, because it is obvious that this witness only knows of the condition of this man after the accident occurred.

The Court: Mrs. Lyons, how many years was this before your marriage to Mr. Lyons, can you remember?

The Witness: That, your Honor, I could not say, but I know he was treated for his spine.

The Court: I beg your pardon?

The Witness: I mean he was treated for this condition after we were married.

The Court: Oh, he was treated after you were married?

The Witness: Yes.

The Court: Do you know what treatment to your own knowledge this consisted of?

The Witness: Yes; I do.

The Court: Will you describe that treatment?

(Testimony of Jane S. Lyons.)

The Witness: Yes. It involved an injury to the spine which would, at times due to movement which was not an exertion [653] of heavy lifting, but a throwing out of the spine which involves discs to the extent that it was very painful in movement. At times my husband could hardly move his legs and we would have to call a doctor in to—as I remember one instance he stretched him between two chairs and suddenly did this (indicating) to his back which threw that back into place. Later, Dr. McKeown had my husband wear a canvas belt which had a wedge-shape ridge in it that fit into the hollow of the back, which gave support so that in a lifting or a sudden turning the back would be supported, and after wearing that canvas belt for some time, it seemed to strengthen it to the point where he put it aside and the only other occurrence I remember of his having thrown it out again was lying on a pad in Palm Springs taking a sun bath, he was called to the telephone and flipped his legs over this way (indicating) and started to hurry and just had to stop in midair, you might say, because of the pain in his back, which was again this throwing out of his back.

Mr. Maguire: That's all?

The Witness: That is all the knowledge I have of it.

Mr. Maguire: That's all.

(Testimony of Jane S. Lyons.)

Cross-Examination

By Mr. Mize:

Q. Oh, Mrs. Lyons, I think that you said on direct testimony at the start of this case that you never—your husband never [654] complained of any pain in his chest or down his arms until that morning at Palm Springs; that is correct, is it not?

A. Yes; it is.

Mr. Mize: That's all, thank you, Mrs. Lyons.

Mr. Maguire: That's all.

The Court: You may be excused.

(Witness excused.)

Mr. Maguire: The plaintiff rests.

The Court: All right now, gentlemen, what is your pleasure with regard to this matter?

Mr. Beebe: If the Court wishes, I believe the plaintiff is prepared to submit argument upon the facts and the law to the Court and we are ready to proceed at this time with that.

The Court: Well, in that regard I prefer to have your arguments in writing to enable me to keep them better in mind. And you may make reference to the testimony as you feel necessary. There is only one point of law as I see it, and that is the Oregon terminology of a contract.

Mr. Kriesien: Insofar as disease being a contributing factor, that is correct, your Honor, there are other phases being involved as to the burden of proof and such things.

The Court: I understand, of course, it would be

of inestimable value to have a transcript of the testimony, but I don't want to place any additional burden upon you [655] gentlemen, so you may make some reference to the transcript as regards some particular point of the testimony, particularly the testimony of—well, the testimony of doctors, that is all there is.

Mr. Kriesien: That is correct, your Honor.

Mr. Beebe: May the Court please, the plaintiff will be pleased to undertake the expense of furnishing a transcript to the Court.

The Court: Well, I don't want you to feel that I forced you into it, now.

Mr. Beebe: No; we do not.

The Court: Because obviously in a case of this kind, it is not humanly possible for a man to take all these terms that have been introduced here, I have taken such notes as I deem proper, but obviously I did not get them all, but again I reiterate that I don't want to force any extra burden upon you gentlemen.

Mr. Maguire: I think it would be of aid to the Court.

The Court: Now, I would suggest that since I am going to leave here a week from today, what time do you want in which to brief, I am going to tell you this, that I am going to write an opinion of this case and it will be forwarded to you with dispatch, not haste, but with dispatch.

Mr. Maguire: Well, your Honor, I think it would be better—we ought to have the transcript to see what we [656] are going to do, because we will want

to look it over and find the material part in this, and I think two weeks, I should think that we should be able, my experience in brief writing, the time consumed, and writing, to find the matter in the record and properly note it, I would think that the plaintiff should be able to submit her brief within two weeks after we receive the transcript.

The Court: I was going to say 15 days from the time you receive the transcript and then you have 15 days in which to reply.

Mr. Kriesien: Thank you, your Honor.

The Court: Will that be satisfactory?

Mr. Kriesien: Satisfactory.

The Court: And then you will forward it to me with the briefs, will that be satisfactory?

Mr. Maguire: Yes.

The Court: Then you may have ten days in which to reply, would that be satisfactory?

Mr. Kriesien: That will be satisfactory. I presume I will have the privilege of reading the transcript?

Mr. Beebe: No: I don't believe that you will have that opportunity if the plaintiff is going to have to supply the transcript in this case.

The Court: Well, I must say, Mr. Kriesien, that it doesn't look very favorable to you; I know that if I were [657] a lawyer, I wouldn't allow you to look at it if I had to pay for it.

Mr. Kriesien: All right, I will have to check with my principals and see if they will go for it.

The Court: Well, I think that concludes everything, gentlemen, it has been a pleasure to have you

in the Court. I have enjoyed the trying of this case, it's always a pleasure to try a case with you gentlemen. The Court will be in recess.

(Proceedings concluded.) [658]

I, William A. Beam, Official Court Reporter Pro Tem of the above-entitled Court, do hereby certify that on November 22nd, 23rd, 28th and 29th, and December 7th and 8th, 1956, I reported in stenotype the proceedings had in the above-entitled matter; that I thereafter caused my said stenotype notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of pages numbered 1 to 658, both inclusive, constitutes a full, true and accurate transcript of said proceedings so reported by me in stenotype on said dates, as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 2nd day of April, 1956.

/s/ WILLIAM A. BEAM,
Reporter Pro Tem.

[Endorsed]: Filed December 17, 1956. [659]

[Title of District Court and Cause.]

Nos. 7256 and 7381

DEPOSITION OF HOMER P. RUSH

Taken in Behalf of Defendants

Be It Remembered that, pursuant to the stipulation of counsel for the respective parties hereinafter set forth, the deposition of Homer P. Rush, M.D., was taken in behalf of Defendants before Gordon R. Griffiths, a Notary Public for Oregon and an Official Reporter to the United States District Court, District of Oregon, on Friday, the 7th day of January, 1955, Room 601, 919 Taylor Street Building, Portland, Oregon, beginning at the hour of 3:00 p.m.

Appearances:

ROBERT F. MAGUIRE, and
HOWARD K. BEEBE,
Of Attorneys for Plaintiff.

RAY MIZE, and
R. E. KRIESIEN,
Of Attorneys for Defendants.

Present: Dr. Charles P. Wilson. [2*]

Stipulation

It is stipulated and agreed by and between the attorneys for the respective parties that the deposition of Homer P. Rush, M.D., may be taken in be-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

half of Defendants at Room 601, 919 Taylor Street Building, Portland, Oregon, on Friday, the 7th day of January, 1955, beginning at the hour of 3:00 p.m., before Gordon R. Griffiths, a Notary Public for Oregon, and in shorthand by the said Gordon R. Griffiths.

It is further stipulated that the deposition, when written up, may be used on the trial of the cause as by law and Federal Rules of Civil Procedure for the District Courts of the United States provided; that all questions as to the notice of time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time the questions are asked, and that all objections as to materiality, relevancy, and competency of the testimony are reserved to the parties until the time of trial. [3]

HOMER P. RUSH

a witness produced in behalf of Defendants, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination

By Mr. Kriesien:

Q. Please state your name.

A. Homer P. Rush, R-u-s-h.

Q. Where do you reside, Doctor?

A. Portland, Oregon.

Q. You are a duly licensed and practicing physician and surgeon practicing in Portland, Oregon?

(Deposition of Homer P. Rush.)

A. I am duly licensed to practice medicine and surgery, but I do not practice surgery.

Q. Doctor, you have had occasion on many occasions to furnish deposition and testify as a witness to a trial and know the purpose of this proceeding?

A. I have.

Q. During the month of February, 1953, you were a guest on a fishing party off the coast of Baja California and Mexico; were you not?

A. I was.

Q. Who were the members of that party, Doctor?

A. The host was Mr. Howard Irwin, and the other three guests, that is, the three guests including myself, Dr. Francis Chamberlain, San Francisco; Mr. James Lyons, I guess you would say [4] Portland or Coos Bay; and myself. There were also two Mexicans aboard that were employed by Mr. Irwin as help.

Q. Where and when did you join the fishing party, Doctor?

A. Well, I met the yacht at La Paz, and actually the date I can't give you exactly. It was approximately February 11th or 12th.

Q. Doctor, just to refresh your memory, Mr. Lyons died on February 10, 1953.

A. February 10th; all right. Well, that was—we met in San Diego.

Q. By "we" whom do you mean?

A. Dr. Chamberlain and Mr. Lyons and myself.

Q. Correct.

A. And were taken down in the plane and got—I

(Deposition of Homer P. Rush.)

have to figure back—got in that night, went part way that night, went down the next day, so it must have been the 8th if he was, if he died on the 10th.

Q. Correct; and where and when did you first meet Mr. Lyons?

A. In San Diego, February——

Q. 7th or 8th, whatever day it was?

A. That is right.

Q. Of 1953. Then, of course, you had had no occasion to treat him in a medical capacity prior to that day? A. Never.

Q. Mr. Irwin was with the party at La Paz when you arrived [5] there?

A. That is right. Oh, there was another man in the party, too. That is Bob Parrick.

Q. He was the one that flew you?

A. That is right, yes; he was also with us on that date.

Q. Doctor, will you outline generally the facts of which you have personal knowledge of the activities of Mr. Lyons and yourself on February 9, 1953?

A. That is the day before?

Q. That is the day before Mr. Lyons' death.

A. Well, we sailed down the Gulf of Lower California on the peninsula side, and we were out fishing for marlin. Later in the afternoon we got down to an area where they seemed to be catching marlin and put out lines. I would feel that this probably was 20 miles or so from San Marcus, which is the tip of Lower California, and we hooked a marlin.

(Deposition of Homer P. Rush.)

Jim Lyons had the pole. He probably spent, oh, someplace between 20 and 30 minutes with the fish he hooked. The fish was a good fighter. It broke water many, many times. We have several pictures of it. He finally lost the fish, but he went through what I would say reasonable physical activity while he was fighting this fish. We did the ordinary things you do aboard, probably ate too much, monkeyed around. I did not see anything particularly abnormal in his actions at any time, nor did he complain of any illness, nor did he show any particular evidence [6] of any illness that I would have detected.

I had many conversations with him during that day. We did, in the evening when we got down to San Marcus, do a little target firing from the boat, and he was obviously a very good gun man. I thought he was a very normal, active, vigorous man of approximately 50.

Q. Doctor, when you arrived in La Paz did you have a strenuous evening that night in La Paz?

A. No; we did not.

Q. Did you go aboard ship?

A. We went aboard the ship within, I suppose, an hour as soon as the luggage and so forth and pulled up anchor and started out of the harbor.

Q. Did Mr. Lyons engage in any drinking on that evening? A. Probably.

Q. I mean in your presence of what you——

A. Probably. I don't recall that. I had two or three drinks, and I am quite certain that he did, too.

(Deposition of Homer P. Rush.)

Q. Nothing out of the ordinary that evening?

A. No; he didn't have anything unusual, nor at no time that I saw him would I have considered him to have been intoxicated.

Q. What about the night of February 9th, the day before the hunting fatality?

A. Nothing unusual; that is, we got in, Fran. Chamberlain and I took the little boat and went fishing along the rocks. I think [7] we got six or eight fish. Every one of them was different, which amazed me to catch that many fish and have them all look so different. We had dinner, I don't recall, by 8:00 or 9:00 o'clock, I suppose. The Port Captain of San Marcus and the Ships Commissioner, I guess they call him, Senor Ruiz, came aboard and checked things over. They checked things over with Hoddy Irwin, and while they were aboard talked about all the doves that were flying, and it was arranged that we would go ashore the next morning and do some dove hunting before we went out fishing.

Q. Do you know approximately what hour Mr. Lyons retired that evening?

A. Well, I would be guessing, but I would think that it was not later than 10:00 or 10:30.

Q. What time did you arise in the morning, if you recall?

A. About 6:00.

Q. About 6:00.

A. Because I griped about getting up so early.

Q. If you will outline in detail what occurred on the morning of February 10th from the time you got up.

(Deposition of Homer P. Rush.)

A. Well, we got up and had some breakfast and went ashore, and I mean by that we anchored out a little ways. We had to use the small boat to go ashore, and we were met there by Senor Ruiz.

Q. By "we" who went ashore, who went ashore with you? [8]

A. By "we" there was Bob, what is his name, Parrick?

Q. Parrick.

A. And Fran. Chamberlain, Jim Lyons, and myself, and drove up through the little village of San Marcus with this little old car that was all held together with baling wire and stopped along the edge of the village and picked up his son, and by that I mean Senor Ruiz's son, a lad of some ten or twelve. We had brought with us a shotgun from the ship and a .22 from the ship, and Senor Ruiz had a shotgun and a .22.

We drove on, oh, two or three, four miles probably beyond the village sort of paralleling the coast road until we came to a place where he said by 7:30 the doves would come over so thick the sky would get black, something like that, and as we looked at the time we didn't think there was a dove around anywhere, and then we got out. It was a beautiful day. Jim Lyons had a magnum shotgun from the ship.

Q. May I interrupt you. What type of shotgun, what gauge, the magnum, what type of gun was it?

A. 12-gauge, I think.

Q. Was it a pump gun or automatic?

(Deposition of Homer P. Rush.)

A. I don't remember. I didn't handle the gun myself, and I honestly don't remember whether it was a pump or lever or what type it was.

Q. All right. Sorry for interrupting you.

A. And I had a .22, and Bob Parriek took [9] the Mexican shotgun which I would not have shot on a bet. It was all wired in the back, but it worked all right. And Senor Ruiz had the other .22.

We got out and admired the morning, thought it was a beautiful day, and Jim Lyons specifically—we were standing there—walked up a little trail which was up a little hill to a ridge, and said, gee, it was great to be alive and feel so good on a swell morning like this, and where were the doves. Fran. Chamberlain became impatient because he had no gun, and he walked back into the village, was going to take some pictures. Finally the doves began to come over. Bob and the Mexican's boy went down the road, I don't know just how far but I would estimate two or three, four blocks, and Jim and I were standing together, and he shot two or three or four doves that went over when we were standing there.

In the meantime, the Mexican showed me a tree that was, oh, some 60 yards or so that doves usually landed in and said, "If you would come over here where you would stand in line with this tree, why, you will get a chance to shoot some with the .22, and I am going to stay up here where I can get a chance to shoot some that come over the ridge in those trees."

(Deposition of Homer P. Rush.)

Now, I imagine that we were off the road 30 feet or so in a mesquite brush country. We were [10] easily within hollering distance although I could not see Jim, after we separated. I don't recall how many doves he got following this, maybe another two or three, but obviously he was a good hunter, and every time you would hear a gun go off you would look up and see a dove fall, and during one of the quiet spells a couple or three doves landed in the tree over there. I was just getting ready to try to get my dove, and then I heard this shotgun go off again, and another dove fell. My reaction was to turn around and tell Jim to go to hell because he could at least quiet that gun long enough so that a bird could land and somebody else get a shot, when I heard a second shot. There was just about that much time for thought element. I didn't see any dove fall on that shot, but then I had my back turned and really didn't think too much about it other than to get ready to holler, when I heard a stridulous wheezing type of noise that I thought might come from an enraged animal. We had seen some cows and some dogs on the way, and I wondered about a mad bull or mad dog, and it was over in the direction in which Jim had been hunting. Then I wondered if that second shot had been at some animal, and I went out from where I was to the road and went down that way wondering what the hell I am going to do with this .22 if there was a bull there, looking for the best tree I could find to get up, and I saw Jim lying on the ground face

(Deposition of Homer P. Rush.)

down on top of his gun, it going from the right-[11] hand side and going out on the left shoulder. He was cyanotic, and he was bleeding from the right side of his face. He was going through marked stridulous breathing. He was unconscious.

I hollered for help. Senor Ruiz who had gone over the ledge to retrieve a dove that had fallen over there that Jim had shot a few minutes previously, came back over this ledge and was the first one that reached me, and then Bob Parrick and Senor Ruiz's boy got there, oh, within a few seconds, and we rolled Jim over in order to try and get the best position we could for breathing and also to get rid of the pulmonary edema that was now coming from his mouth. He was pulseless. When I put my hand on his chest, I could get a tremulous sort of sensation. There also, of course, was much noise from his noisy breathing, and he expired in a matter of, oh, three or four minutes, I would say, four or five minutes, something like that.

Q. Would you say that the time element would be from the time you first arrived, Doctor, and found him in this condition until the time he expired?

A. Yes, it would be something around that. Of course, I am guessing. I would say that two to five minutes would be it, and those two or three minutes seemed like an hour when you wished to hell you had something you could do and didn't.

Q. I appreciate that. Doctor. [12]

(Deposition of Homer P. Rush.)

A. We tried some artificial respiration, which, of course, did not have any effect.

Q. I would presume that, Doctor, this is your best approximation of the time element involved. How long would you say that it took you to walk from the time you first heard the second shot down to the road and up to the finding of Mr. Lyons' body? A. He was still alive when I got there.

Q. Well, I mean alive but finding him cyanotic and pulseless.

A. Oh, I would guess possibly 30 to 60 seconds, something like that; about the distance it would take to hurry along an equivalent of a block and a half. I think that was about the distance. Again, it is awfully hard to tell when you got a lot of brush around, and so forth, just how far it was. I should have stepped it off later, but I didn't.

Q. Was Mr. Lyons at the same point where you had left him? A. Approximately.

Q. Approximately?

A. I would say within a matter of not over 20 or 30 yards.

Q. Will you describe the mesquite brush that was in that immediate area where Mr. Lyons was hunting?

A. Well, I don't know how to describe it other than to say that it was a country that was bushy. Right in that immediate area it was mostly bushes that were from 18 inches to possibly [13] four feet tall. There was an occasional tree that was a low tree. I do not recall of any being right in that par-

(Deposition of Homer P. Rush.)

tiular vicinity. He was under a mesquite bush when he was found. That is, he was lying with his head under this mesquite bush as though he had fallen, and I would say the mesquite bush was probably about four feet tall and possibly the circumference of four to six feet—I mean a diameter of four to six feet. It was a fairly good-sized bush.

Q. Did you examine——

A. The country—also, there was a lot of those mesquite roots so that it was not even footing.

Q. Was there any indication on that particular mesquite bush that Mr. Lyons had fallen into it?

A. No, there was not.

Q. There was no breakage of limbs or anything that you could observe? A. No.

Q. You say you rolled Mr. Lyons over. Did you move him any appreciable distance?

A. No, just about the distance that I imagine you would roll a man over. I do not think he was moved at the most over three feet from where he——

Q. Were there any indications on the ground to indicate that the shotgun might have discharged into the ground?

A. No, there was not. We searched for that [14] quite diligently and also the brush around there.

Q. Did you find any evidence?

A. No evidence at all. That is why we assumed that he must have been upright when the shotgun went off.

Q. How was Mr. Lyons dressed insofar as a shirt or a sweater or that sort of thing?

(Deposition of Homer P. Rush.)

A. Oh, I would say just the ordinary clothes that a fellow may use going hunting. I don't remember.

Q. What I am getting at, Doctor, was it a shirt, sleeved shirt, or a——

A. I don't remember that honestly.

Q. The point I am driving at is that the Mexican autopsy report indicated some markings on the right arm, and I was wondering if that arm happened to not have a sleeve as to whether those markings were made at the time of this particular accident.

A. I couldn't answer that. I just don't remember. He well could have had just shirtsleeves. It was a beautiful warm morning, but I don't remember what he had on.

Q. You remarked that Mr. Lyons was a good shot.

A. Yes.

Q. Did he appear to be experienced in the handling of guns?

A. He did. He seemed to me very experienced.

Q. In your discussions with him the preceding day or days and nights had you had occasion personally to talk over with him his condition of health? [15]

A. No, I did not. This subject was not brought up at all.

Q. Did Mr. Lyons appear on those preceding days to be attempting to rest and take things easy?

A. Not any more than the rest of us. He stated that he had been checked over by Dr. McBride who

(Deposition of Homer P. Rush.)

told him he had been working too hard and should get rest, and he was feeling very good and that he thought that this was going to do him a lot of good to be on this type of trip. I mean there was nothing mentioned about any symptoms or status of health other than just the generalities.

Q. Mr. Lyons mentioned that to you personally, Doctor?

A. Yes, he mentioned that to me personally.

Q. Did you examine the shotgun to ascertain whether there was a discharged shell in the barrel?

A. I did not.

Q. You spoke of ——

A. But I think—well, go ahead.

Q. Pardon me.

A. It was examined, but I did not do it.

Q. You spoke of Mr. Lyons having blood on his face. Did you examine his face? A. I did.

Q. What did you find, Doctor?

A. There were what I would interpret as powder marks and scratches. There did not seem to be [16] anything in the face and, my recollection is, I think down to the neck a little bit, and there was no appreciable amount of a blood spot although he had been lying down that way on the ground where I first saw him, and we felt that, of course, when we first saw him that it was a gunshot wound that killed him until I started to search and I could not find any evidence of any serious wound.

Q. How would you describe the severity of the scratches or wound to the face?

(Deposition of Homer P. Rush.)

A. They were comparatively superficial.

Q. Could you tell whether the skin had been ruptured?

A. The skin had been broken in several places like scratches, as I would say, or powder burns.

Q. Could you determine whether those scratches were made by the mesquite brush or——

A. My impression was that they were made by the explosion of the shell, but I actually did not do any careful searching to determine whether there were any mesquite brush slivers or what not. I didn't notice any.

Q. Did the scratches have the appearance of being rather straight lines, or were they jagged?

A. My impression is that they were straight lines; that they were not, as I recall it, particularly long. It was merely, as I say, like powder burns, the impression that I got.

Q. More than a rupture of the skin? I [17] mean, there was no appreciable depth to the rupture, was there, Doctor?

A. No, but the skin was lacerated, broken, and I think we found, felt one pellet under the skin.

Q. Doctor, you stated that you put your hand on Mr. Lyons' chest and felt a rather tremulous sensation. Would you describe that and what it, in your opinion, was?

A. It was just a sensation like you might put on a cat when it is purring. You could feel something was going on in the chest which was not a regular

(Deposition of Homer P. Rush.)

type of a heartbeat like I would expect to feel. It did not have any regularity, and it was more difficult to interpret because of the vibration of his chest wall from his stridulous breathing and this moisture that was now beginning to develop.

Q. Then you would not be able to, or would you be able to, render an opinion as to what this tremulous sensation was indicative of from a medical standpoint?

A. Yes, I had a definite opinion that I expressed at the time.

Q. What was that opinion, Doctor?

A. That I thought this man died a heart death and not a death from the shotgun wound doing damage to any vital organ.

Q. But my question, Doctor, is to this particular tremulous sensation.

A. I thought it was due to ventricular fibrillation.

Q. Thank you, Doctor. I wanted to know [18] whether you could feel the ventricular fibrillation.

A. Yes, that is what went through my mind. I don't know that you could feel, that it would be a flutter or a tachycardia, but that is what went through my mind when I felt it, that I couldn't get a pulse and I could feel this tremulous feeling, "Is this ventricular fibrillation?"

Q. Doctor, will you give a rather detailed account of what transpired after Mr. Lyons died and insofar as your personal knowledge is concerned?

A. Well, following this the Mexican, Senor Ruiz,

(Deposition of Homer P. Rush.)

and his son got their car and went back to the village to get Dr. Chamberlain and Mr. Irwin. Bob Parrick and I stayed with the body. We were both, naturally, somewhat upset. We walked back and down the road wondering why it had to happen and so on and so forth, and the Mexican and his—I presume his wife, drove by, stopped. She could speak some English, and Bob was, of course, very fond of Mr. Lyons. He wondered about moving him into the shade and so forth, and this woman said, "Do you realize that anybody killed accidentally, you must not touch the body until the coroner gets here." Well, that sounded like good sense to me, so we decided we had not better try to do any moving, and we waited then, I suppose, maybe a half hour, maybe three-quarters of an hour. It had gone back to the ship because the Mexican said the doctor, that I was the one that had been killed, [19] and Fran. Chamberlain, when he got up and Bob and I met him on the road I don't know whether they thought it was a ghost or what not, but they were quite surprised, and they brought one of the Mexicans from the ship whom they used as a guard.

In the meantime, the police of this village sent down a guard. We attempted to build a brush shelter in order to shade him somewhat from the sun. It was getting quite hot by this time, and insects, ants, and so forth, were beginning to be very troublesome. We sent back to the ship and got a tarp and oil, and built a tarp roof over him as best we could to keep the sun off. We put an oil

(Deposition of Homer P. Rush.)

ring around it and got the ants out from the inside so we could keep them from mutilating the body too much, and had the guard to keep the buzzards off. Nothing could be done until the coroner or his equivalent came from San Jose, and that was a matter of several hours.

In the meantime, we had been informed that we had to be certain that this body was embalmed and taken out of the country within 24 hours, or it would have to be buried in Mexican soil. We did not know how authentic it was, but it was given us by the Prefect of the Police or whoever they call him down there, and we assumed that it probably meant something.

Fortunately, we had this yacht of Hoddy Irwin's. That was a fast boat, and he had his airplane [20] up at La Paz so we made a run that night—well, that is getting ahead of my story. Approximately 2:30, I would say, in the afternoon this official came down from San Jose with two cars. There were two doctors. I would judge about 35.

Mr. Maguire: You mean 35 years of age?

The Witness: About 35 years of age, and other people in the party, helpers or what not, that sized it up and looked things over and made their description, and he was packed up and taken to San Jose where the autopsy was to be done that night. These two Mexican doctors were both very co-operative. One of them could speak a little broken English, probably better English than my broken Spanish. Fran. Chamberlain could speak

(Deposition of Homer P. Rush.)

better Spanish, and between the two of us they were to do the autopsy at 9:00 o'clock that night, and we were allowed to be present. I mean we were given permission to be present. Fran., not being there at the time of his death, was not held for the inquest, but I was, and was asked to go over with the party, which I did.

In the meantime, a chap who had been a classmate or a schoolmate of Jim Lyons at Oregon State, came over from a yacht that was anchored right near ours, and he had, I don't know whether it was his plane or not, but he had access to a plane and a pilot, and Bob Parrick went with this chap with the idea of going up to La Paz where we could get Mr. Irwin and Mr. Lyons' plane and [21] come down to San Jose. However, on the way up this plane broke down three times, and we were lucky we did not lose another man, and Hoddy would not let Bob go on with this fellow.

Mr. Maguire: When you speak of "Hoddy," do you mean Mr. Irwin, Howard Irwin?

The Witness: Howard Irwin, yes.

We finally got aboard ship opposite San Jose where Mr. Irwin had moved the ship up to, and it was about, I guess 8:30 or 9:00. We had tried to get in touch with these two Mexican doctors and had been unable to locate them. At the hospital they did not seem to know anything about it, didn't know when they were going to be there, when they were going to do the autopsy. We had had, of

(Deposition of Homer P. Rush.)

course, nothing to eat since morning, and we had to be rowed out, as a storm had come up, through the surf to get onto the boat.

By the time we had had dinner and the like we sent word on up that we would be down in the morning and felt that we should start out for La Paz in order to keep our time element of meeting the Governor at 7:00 o'clock in the morning, which by phone in the meantime contact had been made. We had a very stormy run that night. This yacht was equipped with radar and beautiful equipment, but I think everybody aboard except Mr. Irwin and myself were quite violently seasick, and we got into La Paz a little bit after 7:00. We were met [22] there by this Mexican Commissioner that knew Mr. Irwin, and he took me immediately up to the Governor's mansion. The Governor was away on a vacation, and his assistant or his second-in-command, I think he was called Secretary of State, was the man that I met. He could not speak English, but the man that was with me was a good interpreter, and we got permission to bring in a plane to take the body out, providing it had been embalmed. We had arranged for that the night before over at San Jose.

Mr. Kriesien: Off the record.

(Discussion off the record.)

Q. (By Mr. Kriesien): Did you return to San Jose, Doctor?

A. Then Bob Parrick flew me down the next

(Deposition of Homer P. Rush.)

morning, and we spent all that day supposedly at the inquest down there, and in the meantime had contacted these Spanish or these Mexican doctors, and they stated that they had done a post. They had waited for us, and yet, at 9:00 o'clock when we had been there, the Sisters in the hospital or nobody knew anything about when or where, so apparently there had been a mixup on location.

They stated that they had found aortic coronary insufficiency, and they felt the man had died because of his background of heart pathology.

Also, it took us about eight hours with the help of one of the merchants in the town who had been educated in Los Angeles and spoke good English to get [23] our papers so we could get the body out. We had to have a certificate from these doctors that they had embalmed him within such-and-such time, and we must have made at least six or eight trips out to the hospital before we got that paper. Then the inquest was held—I am just a little hazy in my mind—we started it, I believe it was started in the morning and then went into the afternoon, and it was interrupted many times, and I think we came back and finished it the next morning. Then arrangements were made with one of the airlines to send in a plane that could take his body up to Coos Bay.

Q. Doctor, did the Mexican doctors advise you of their specific findings of the autopsy?

A. Only in regard to what I have told you. They stated that—language difficulties made it a little

(Deposition of Homer P. Rush.)

hard. One of them attempted no English, and the other one was not very good, but the conclusions were, from our conversation with them, that that was what they felt the autopsy had shown, arteriosclerosis of some of the vessels about the heart, with aortic insufficiency and coronary insufficiency and superficial gunshot wound.

Q. You were advised of those facts by the doctor at that time? A. Right.

Q. Then you were not present when the autopsy was performed? A. No, we were not. [24]

Q. And neither was Dr. Chamberlain?

A. No.

Q. Doctor, the facts that you have outlined are all the material facts of which you have personal knowledge concerning this occurrence; is that correct?

A. I believe they are. There might be some of these details that are——

Q. But all material?

A. That I don't recall——

Q. But of the material facts?

A. Yes, I think that covers it except paying the bills.

Q. Doctor, when you prepared and executed your affidavit of March 31, 1953, had you examined the Mexican autopsy report of the Mexican doctors?

A. No, it is only what I had gotten from them down there and a little summary that I had—I don't know whether they gave us that summary now or whether I saw it up here, but I did see a

(Deposition of Homer P. Rush.)

little summary that they had prepared which was essentially the facts that I told you.

Q. Did that summary merely contain their conclusion as to cause of death, aortic insufficiency, coronary insufficiency, or did it give the specific findings?

A. No, that was more than their conclusions.

Q. Doctor, I do not want you to obtain the impression on this that I am quibbling with you [25] over the terminology of your affidavit. I understand how these are given at times, but in my opinion, they contain certain opinions rather than matters of fact, and I want to examine you in detail on these various factors, and if you will please bear with me.

A. Surely.

Q. Will you please explain the circumstances under which your affidavit of March 31, 1953, was prepared and executed?

A. That is on the affidavit?

Q. This is the first affidavit on your letterhead.

A. That was executed in this office.

Q. By yourself? A. No, I think——

Mr. Maguire: You mean executed or prepared?

Mr. Kriesien: Prepared.

The Witness: I think I dictated the things as I recalled and felt they were, and I think it was in the presence of Bob Maguire, if my memory is right. I would not swear to that. Then I went over it and corrected them because I remember there were some things that I did not think—then it was

(Deposition of Homer P. Rush.)

rewritten. It was rewritten by my girl in my office, and the notary was the girl in my office that swore to my signature.

Q. Doctor, in this affidavit of March 31, 1953, you state, "From my own observations made at the time of his death which are corroborated by the autopsy report I certify, one, that James A. Lyons had an underlying coronary artery disease." [26]

Was this a fact that could be observed by you, or was this the fact that was furnished to you by the Mexican doctors?

A. The fact that was furnished to me by the autopsy that he had coronary disease. I made the statement previous to the autopsy that I felt they would find one of two things present and that I thought that they would find coronary artery disease.

Q. You further state that when the shotgun was discharged the explosion and concussion produced a shock. What precisely do you mean by the term "shock?"

A. In that it produced a reaction of the nervous system and body chemistry, I suppose you would have to include, that caused a disturbance in circulation and probably a lot of increased stimuli going from the central nervous system out into the peripheral vascular system and a great sense of fear.

Q. Do we sometimes term this, Doctor, an emotional upset or a psychic trauma?

(Deposition of Homer P. Rush.)

A. I would think that you could. I think psychic trauma can cause shock. In fact, I am sure it can.

Q. At the time that you came upon Mr. Lyons' body in an unconscious state, cyanotic and pulseless, were there any objective symptoms that he had sustained a shock?

A. Well, he was pulseless. That would be [27] an objective symptom of shock.

Q. But there would be other factors that could cause him to be pulseless in addition to shock; is that not correct, Doctor?

A. Yes, I think that would be correct.

Q. Would the autopsy reveal, or did the Mexican autopsy reveal that Mr. Lyons had suffered a shock?

A. I do not know of any definite findings that one could rely upon to say whether a body had been in shock or not by an autopsy surgeon. That would be more of a functional factor of the circulation than it would be an autopsy finding.

Q. You then proceed in your affidavit, Doctor, to state that that shock precipitated an acute angina. Doctor, what is a definition of an acute angina in layman's language?

A. The term probably angina should not have been used. We should have, if we were going to use that term, added to it pectoris. Angina pectoris means pain in the chest, or pain in the breast would be more accurate. Theoretically, it would be pain in the breast from any cause, but the last twenty years or so it has become quite common medical usage to use it as pain caused by a disturbance in coronary

(Deposition of Homer P. Rush.)

circulation which comes on with any physical or emotional upset. Other factors can produce it also, but those are the common ones, and characterized by severe pain so that the patient stands still, and lasts a period of usually but a few moments, [28] very frequently only seconds, and is usually relieved by inactivity or deep breathing or nitroglycerin.

We would have been more correct in this affidavit to have stated an acute coronary insufficiency which would describe the underlying condition and not the symptom because angina really just describes the symptom.

Q. Can shock, Doctor, such as you described produce death without causing an acute angina?

A. Yes.

Q. Or angina pectoris, and, of course, I believe, Doctor it would be impossible for you, finding an individual just unconscious, cyanotic and pulseless, to observe any objective symptoms that the shock had precipitated an acute angina pectoris; is that a fair statement?

A. Yes, I think that is a fair statement. I believe the term was poorly used. It should have been coronary insufficiency.

Q. If we substitute your coronary insufficiency, is it a fair statement——

A. I have no objective evidence other than the fact that I felt he was in ventricular fibrillation to support that.

Q. Thank you, Doctor. Now, would any autopsy, or did the Mexican autopsy reveal the sequence of

(Deposition of Homer P. Rush.)

events, namely, shock, acute angina or coronary insufficiency?

A. The autopsy did reveal coronary [29] insufficiency.

Q. It did. Thank you; but not what precipitated the coronary insufficiency?

A. No, I don't think the autopsy could.

Q. You then went on to say that this acute angina caused some coronary occlusion, and the sudden ventricular fibrillation of the heart which caused his death. Well, Doctor, what do you mean by that term, "some coronary occlusion"?

A. Coronary insufficiency.

Q. Coronary insufficiency?

A. A lack of normal coronary blood flow.

Q. Does angina pectoris cause a lack of ordinary blood flow? A. It can.

Q. Is it a commonly accepted cause, or is it more or less of a rarity?

A. Well, you are asking now for a question that is of great medical discussion. The concensus of opinion is that angina is always associated with anoxemia. Now, that old idea of spasm of the coronary vessels, of course, is pretty well exploded, but it is decreased amount of blood flow due to size of a vessel due to the force that is put out. From my point of view in that affidavit it does not make any difference. I am not trying to define words. I was just trying to get a word picture.

Q. That is what I am trying to get at, too, Doctor, is in layman's language a word picture [30]

(Deposition of Homer P. Rush.)

of what you were attempting to describe. Then do I understand your statement that there was, in your opinion, a coronary insufficiency and that perhaps the words used, an acute angina causing a coronary occlusion, was an attempt to be descriptive of those words? A. That is right.

Q. Doctor, what is ventricular fibrillation?

A. It is where there is tremulous movement of the—let us just say what is fibrillation.

Q. Yes.

A. Fibrillation is where there is a tremulous movement of a muscle instead of a co-ordinated contraction, and with the ventricular fibrillation it means it is in the ventricle of the heart and instead of the heart beating as a unit where it can act as a pump to force out blood as my contracting hand would show (indicating) it is where the heart merely has fibers that are contracting independently like working my little finger a little bit would show (indicating) without any contraction that would force any blood out so it is virtually the same, physiologically speaking, as though it were a heart spasm.

Q. The failure of the ventricular muscle to work then stops the normal flow of blood? A. Right.

Q. Doctor, what was the occasion for and the circumstances under which you had prepared and executed a supplemental affidavit of July 10, [31] 1953?

A. I do not even remember what it was.

Q. I will give you a copy of it. Off the record.

(Deposition of Homer P. Rush.)

(Discussion off the record.)

The Witness: I think it was merely a matter of trying to get a little bit more detail and a little bit more of the story than this sheet here. The first one is the one that I gave as I thought the train of events had occurred. The second one was given to try and show the complete or somewhat complete facts that went on that led up to my deciding what I decided that was put in the first one.

Q. At the time of your preparation and execution of this supplemental affidavit I refer to, July 10, 1953, had you examined the Mexican autopsy report, and had you examined Dr. McBride's medical case history file on Mr. Lyons?

A. I can't answer that question truthfully. I had examined both of them, but as to what dates I examined them I would not be certain. My impression would probably be that I had examined Dr. McBride's records and seen them because I lost them in my own files for a period of several months when we were moving our office, and I believe the autopsy report I saw after that, but I am not just positive of those dates.

Q. You would not care to say one way or the other?

A. No, I have seen both of them, but I can't say as to what date.

Q. Doctor, in your affidavit of July 10, 1953, you state in [32] effect that Mr. Lyons was in good physical condition the morning of the accident. By that

(Deposition of Homer P. Rush.)

statement in your supplemental affidavit you do not intend to convey, do you, that Mr. Lyons was suffering from an underlying coronary artery disease?

A. I would have had no way of knowing it had he been. He looked perfectly normal to me.

Q. But, I mean if you had these facts that had been revealed to you by the Mexican doctors concerning the arteriosclerosis, the other basic findings they advised you——

A. He undoubtedly must have had them previously, but they were producing no symptoms or giving him any difficulties that I could note on being with him and as a companion.

Q. My question was, going back, that by your supplemental affidavit you did not intend to convey, did you, that the man was not suffering from underlying heart disease?

A. No; just the way he appeared to me as I saw him as a companion.

Q. You have examined the Mexican autopsy report? A. I have.

Q. And are familiar with the findings with reference to the heart condition?

A. Yes; I am familiar with the translation.

Q. Correct; and the translation that you examined, did that contain the finding of gallstones in the cystic duct of Mr. Lyons? [33]

A. It stated that there were gallstones.

Q. But it did not locate where they were, that translation? I mean at the time you executed this affidavit is what I am going back to.

(Deposition of Homer P. Rush.)

A. I did not know it at the time I made that affidavit that they were there.

Q. But going back to these various other findings of the Mexican doctors, are those conditions found in what you would term a normal heart?

A. You mean what I have described?

Q. Yes.

A. No; they are not. Both coronary insufficiency and aortic insufficiency would be abnormal.

Q. Are they diagnosable without an autopsy?

A. They could have been diagnosed in life with adequate checkups in the great majority of cases, but I do not believe they would be diagnosable by an individual sitting across a table talking with a man or walking down the road to be able to detect them.

Q. Would you term an individual that had this, that is, that heart condition, to be one in good physical condition?

A. That would depend entirely upon the degree. I think it is very fair to say that there are people with coronary insufficiency that lived many years. In fact, I know some that have lived over 25 years, but I had evidence that they [34] had it 25 years ago. I think it is also fair to say that with an aortic insufficiency that is mild that people can go along for years and years. I can name you one doctor that I know had a marked one who lived to be past 50 and carried on a very active work, so it would depend entirely upon the degree as to whether you would state that he was in good physical condition.

(Deposition of Homer P. Rush.)

He is not normal as regards his heart, but if his heart would compensate so he could carry on normal work, I believe you would consider him an individual in good physical status as you would expect anybody of that age to be living with the limitations that he lives with and the work he is doing.

Q. But if he had those conditions and the next day he expired as a result of those conditions, would you say that he was in good physical condition the day before?

A. It would depend upon what caused him to expire. If he were knocked over by an automobile, I don't believe that would make a bit of difference.

Q. I appreciate that, Doctor. What I am getting at, I mean if he dies of a heart condition, omitting the precipitating cause of the heart condition.

A. If he died of the heart condition and there was no precipitating cause, I would say he was not in good physical condition the day before.

Q. Thank you. Doctor, you used the term an anoxemia of the [35] ventricular muscles of the heart. What does that mean to laymen?

A. A what?

Q. An anoxemia.

A. That there is a decrease of the amount of oxygen being supplied to the muscle, and, of course, no muscle can work if that becomes inadequate.

Q. Are there any objective symptoms of that in a person who is unconscious, cyanotic, and pulseless?

(Deposition of Homer P. Rush.)

A. No; I do not believe that you would have any objective symptoms that you could dogmatically say it is anoxemia. You have a heart that is in ventricular fibrillation, would have to be anoxemia because it cannot get blood. You would assume that a heart would have to be anoxemic in an individual that is cyanotic with pulmonary edema because none of the tissues was getting oxygen, and he would be out for that space.

Q. That was the usual condition brought about?

A. That is right, and the heart would be impaired; therefore, it would be anoxemia.

Q. Would that condition be observable upon the performance of an autopsy?

A. Whether it was or was not anoxemia?

Q. Yes.

A. Only by an indirect conclusion, I would think.

Q. It is a matter of opinion; is that correct, Doctor? I [36] mean, we have the term of the event of death and a course of working back; is that the way you arrive at that?

A. I am sure there was a definite passive congestion, so you would have to have heart failure that involved the tissues as a whole, and you would assume that the heart was involved the same as the rest of the body was involved. This man had evidence of passive congestion that you could see clinically and that there was objective symptoms for.

Q. Doctor, on Page 4 of your supplemental affidavit of July 10, 1953, you state, "I learned later that this man had been checked over by Dr. William

(Deposition of Homer P. Rush.)

McBride of Palm Springs a day or two before this trip. He had been assured his general status was good; that he was tired and probably needed a vacation. It is my medical opinion that this man was in good physical condition the morning of the accident, with no evidence of cardiac strain, nor had he been under any exercise or excitement that would have produced a cardiac strain previous to the explosion of the shotgun which caused the superficial wounds."

Doctor, assume the fact to be that Mr. Lyons on May 12, 1950, after hurrying to answer a phone call was seized with sudden pain in the right and left arms to the extent he could not hold a phone; on February 3, 1953, he had constricting chest pains; on February 4, 1953, he had constriction in the chest and radiation down the arms, was given a prescription of [37] nitroglycerin, still had pain on February 5, 1953, and was advised that he could go on a fishing trip provided he did not do any extensive work such as tramping around fields or heavy lifting; that his condition was diagnosed as a cardiac fatigue due in all probability to excessive emotional stress.

Would your opinion have been that Mr. Lyons was in good physical condition on the morning of February 10, 1953, with no evidence of cardiac strain?

A. It could have been. I knew none of these facts that you are mentioning now, but you are bringing out just some isolated facts and asking me

(Deposition of Homer P. Rush.)

to make an opinion. I would say that anybody that was subject to angina pectoris and suffered—and I assume that is what this man was—by which you say after he hurried to a phone he had pain across his chest, went down both arms, was constricted in nature, relieved with nitroglycerin, I would feel that he had evidence of coronary insufficiency.

Q. Would that be termed also angina pectoris, Doctor?

A. Angina pectoris would be the symptomatology of the coronary insufficiency.

Q. I see.

A. It has been, that term—three terms have been used in coronary artery disease, and there is a differentiation made by some groups as to angina pectoris, coronary insufficiency, and coronary occlusion which is really all a matter of degree of how much heart muscle involvement. A man with angina could have [38] a perfectly normal electrocardiogram and a perfectly normal post, autopsy, with no evidence of heart damage that you could detect; yet he dies from angina, probably due to ventricular fibrillation. That work has been carried out by Meek at the University of Wisconsin several years ago in which he proves 50 per cent of them a pathologist cannot determine whether they had ventricular fibrillation or not. There have been a few cases in which electrocardiograms have been checked by individuals at the time it happened, and such information was obtained.

Q. Doctor, would a case history of Mr. Lyons as

(Deposition of Homer P. Rush.)

I have outlined to you be, in your opinion, indicative that Mr. Lyons had an angina pectoris condition?

A. If he had the symptomatology that you have just mentioned, I would certainly be very expectant to have been able to prove that he had angina.

Q. Doctor, isn't it a fact that a diagnosis of angina pectoris carries with it the implication that death may occur suddenly? A. It used to.

Q. Does it still carry that?

A. It does not carry as much of an implication now as it did, and for that reason we do not tend to use the term angina because most laymen feel that same way about it, and yet, many people, as I say, will go along for 20 to 25 years with angina and carry on a reasonably active life. I recall one physician, Dr. Rand in this town, who had angina for over 35 years who [39] stated that the reason he never had difficulties was because he always could get nitroglycerin and never allowed the spasm to go to the point of anoxemia and ventricular fibrillation, and he practiced for the 35 years and died of pneumonia, so that I do not believe one can say that because one is labeled as an angina that it means you got to die a sudden death any more than I believe you or I might not be killed walking across the street by an automobile. We can be, but we do not expect to.

Q. But to remove that implication of sudden death is it not necessary that certain prophylaxis

(Deposition of Homer P. Rush.)

be taken by medication or refraining from doing extensive physical work?

A. I think certain prophylaxis should be taken. There is a big debate as to what the physical activity should be, of course, even to the point now where it is felt that the average doctor keeps a patient with coronary occlusion, myocardial infarction which is the third stage of this picture, in bed entirely too long and inactive too long. The present trend is to get them up and back on their original job within six weeks, if possible, as it has been reported by Dr. Levine who made quite a study of it in Boston.

Q. But, assuming the fact to be that the individual——

A. An individual that has angina, I think, would be more subject to having any type of a strain that might produce an adequate amount of anoxemia to change the chemistry of his [40] muscle so that he could have a ventricular flutter or fibrillation which could cause death.

Q. Assume the fact to be, Doctor, that on February 5, 1953—or on the dates of February 3rd, 4th and 5th of 1953, Mr. Lyons had constricting pains in his chest, down his arms and had nitroglycerin prescribed for him. There are many——

A. Did the nitroglycerin get relief? Did I understand it to get relief; do you know?

Q. That I do not know, Doctor.

A. Because there are other things that could give pain besides angina, in the chest.

(Deposition of Homer P. Rush.)

Q. That is correct. Would you read that last question?

(Last question read.)

Q. And there are many cases which could precipitate an acute angina pectoris and the resulting anoxemia of the ventricular muscle of the heart and ventricular fibrillation; is that correct, Doctor?

A. I think that is right.

Q. Is an angina pectoris condition or a coronary sclerosis or coronary occlusion condition a continuing one?

A. Well, let us divide them a little bit. Coronary insufficiency and coronary sclerosis tend to go together. We would expect it to gradually progress over the years. On the other hand, we would also expect some collateral circulation to be formed. With adequate therapy we could expect [41] collateral circulation to be formed in some which would aid the condition.

Mr. Beebe: Would that be in layman's language a compensation for the sclerosis?

The Witness: Yes, a compensation for the decreased blood supply. A coronary sclerosis, if it goes far enough, can produce occlusion, and, of course, an occlusion does heart damage then, and that is a different picture than the anoxemia which is theoretically a temporary damage. It is in there right now, and if it is bad enough right now you might get ventricular fibrillation from it; but if circulation can pick up and carry these waste products and so forth off, and the irritability of the

(Deposition of Homer P. Rush.)

heart muscle disappears, then we get over that particular acute probability.

Q. (By Mr. Kriesien): Are you speaking, Doctor, are you not, of where you have a complete coronary occlusion?

A. No, I am talking about where you do not.

Q. Where you do not?

A. Where we have a complete coronary occlusion you are going to have heart muscle damage that is going to progressively change and go to scar, and if one lives longer. The first one, it is not going to scar; it goes back to normal.

Q. Doctor, was it your opinion the precipitating cause of anoxemia of the ventricular muscle of the heart producing the ventricular fibrillation which ended in death was an angina; [42] is that correct?

A. It was a coronary insufficiency.

Q. Coronary insufficiency. Doctor, what are most commonly—Doctor, if a person had a normal heart, could a psychic trauma or emotional upset such as a shock from the explosion and concussion of a shotgun together with superficial injuries such as sustained by Mr. Lyons, independently of all other causes and not contributed to by disease, produce a coronary insufficiency and resulting death?

A. In my opinion, it would be very, very rare. I do think that such a thing is possible as has been demonstrated in some of the South Sea Islanders where they make up their minds that today is the day they are supposed to die, and they go out, have a big celebration, and they go down and die, and

(Deposition of Homer P. Rush.)

which is quite a mystery to medicine, and by checkups carried out by English physicians they apparently have to do with some type of nerve-emotion reflex that cuts down coronary flow, so I think—I do not know whether those individuals were all normal or whether they were not, but an individual that has coronary artery disease would be much more apt to have an emotional upset like the explosion of a shotgun cause his death than would one that did not have it.

Q. And the one that did not have some coronary or heart disease, it would be the exception?

A. That is right. [43]

Q. Rather than the rule?

A. Definitely.

Q. If the psychic trauma or emotional upset——

A. Definitely the exception. I think it would be a very, very rare thing. I have never seen or heard of one other than these reports from the South Pacific.

Q. Doctor, it is a fact, is it not, that the extent of emotional upset or reaction or psychic trauma to the explosion and concussion of a shotgun and infliction of superficial injuries will vary with every individual and be dependent upon many factors?

A. Right.

Q. You would not expect the same emotional reaction or shock from an individual who was experienced and familiar with the handling and discharging of shotguns as you would with one that was not accustomed to handling such weapons?

(Deposition of Homer P. Rush.)

A. I do not believe that that would be a factor at all.

Q. You do not?

A. I think the individual that is a high-strung emotional, energetic type that works under high pressure would be much more apt to have it than an individual that is phlegmatic would be apt to have it. An individual that knows his guns and so forth never gets himself in a position where he is afraid of the gun; and when he does get himself in that position, if he is a highly strung emotional type, I believe would [44] be more apt to have it than a phlegmatic individual who did not know a gun and got himself in the same position.

Q. I see. But the normal explosion or discharge of a shotgun would not have any effect upon it?

A. I do not think it would.

Q. You would not expect the same emotional upset or reaction from the infliction of superficial injuries to one who had suffered rather more severe personal injuries in the past as one who had never been injured, would you?

A. I don't believe I followed you.

Q. My question was this, Doctor, that you would not expect the same emotional upset or reaction from the infliction of superficial injuries such as Mr. Lyons sustained when he had experienced other and greater personal injuries in the past than if he had never suffered personal injury?

A. I think that would be correct if the super-

(Deposition of Homer P. Rush.)

ficial injury was due, was caused by scratching, we will say, from a bush or something, but when you have got a high-powered gun that goes off right next to your ear and you do not know what the effect is during those few seconds I am not at all sure.

Q. Doctor, I do not know whether you have had occasion to examine the, let us say, new translation or translations of the Mexican autopsy report with reference to the gallstones and their location.

A. I have. [45]

Q. You have?

Mr. Beebe: Just a moment. In that connection are you referring to the translation of the interrogation of the doctor down there or the new translation that we have had made since the one which we furnished you of the original autopsy? Dr. Rush has seen, has a new translation that we had made of a more literal nature than the other one which was a free translation, but he has not seen the translation of your interrogation of Dr. Serano.

Mr. Kriesien: I have not seen yours either, Mr. Beebe.

Mr. Beebe: We have had the other day. We have only got part of it, only the relevant part of it.

Mr. Maguire: I may say it has been dictated. The belt has been delivered to my office this morning. It has not been transcribed.

(Deposition of Homer P. Rush.)

Mr. Kriesien: I have my original translation. I think I have the supplemental transaction.

Mr. Beebe: Which one are you talking about, when you submitted those questions down there?

Mr. Kriesien: No, I have the original. I have been through the original translation. Off the record.

(Discussion off the record.)

Q. (By Mr. Kriesien): In referring back to the gallstones, the translation furnished me by Mr. Maguire and Mr. Beebe reads, of the Mexican autopsy, "Moreover, containing two stones, one [46] of approximately one centimeter in diameter, located in the outlet mouth of the cystic canal, and the other smaller of three millimeters diameter in the bottom."

At the time you prepared your affidavits were you aware of the existence of these gallstones?

A. No, I was not.

Q. Doctor, I will ask you whether or not, in your opinion, the lodging of a gallstone one centimeter in diameter in the outlet of the cystic duct is a commonly accepted precipitating cause of an acute agina? A. No.

Mr. Beebe: Before you answer that, just a minute. I want to make an objection, Doctor, and then they can take your answer. Object to that upon the ground and for the reason that there is no evidence that there was such a gallstone lodged at any point.

Mr. Maguire: In that connection will counsel

(Deposition of Homer P. Rush.)

stipulate that in interviewing the doctors who made that report they informed him that those gallstones were free?

Mr. Kriesien: Oh, yes; I will so stipulate.

Mr. Maguire: All right; okeh.

Q. (By Mr. Kriesien): Now, instead of the word "lodging," located, should I use that? Is that a commonly accepted cause or precipitating cause of angina?

A. It is not a common, accepted precipitating cause. [47]

Q. It is not?

A. Not a common one. It may happen.

Q. It can happen. Well, has it happened——

A. This work, I think, is based upon an original work that came out from Wolford at the University of Pennsylvania many years ago in which he showed that with certain gallstones or gallbladder disease you could get what we then called an electrocardiographic pattern from gallbladder disease, and it did not have anything to do with coronaries. Well, that was later shown to be erroneous; that probably you could get a reflex that would produce some change in the coronary vessels that produced the change in the electrocardiographic but did not come from the gallstones per se. At the present time I think it is definitely accepted that you can get reflexes from the upper G.I. tract and the gallbladder that can give you some disturbance in coronary blood flow. I do not believe there has been a known case, at least not to my knowledge, of a

(Deposition of Homer P. Rush.)

death produced by such an affair. I think it is fair, further to go into this question, to state that about 25 per cent of all pregnant women who have lived beyond the age of 50 and probably less than one per cent of those will even know they have gallstones or will ever have any heart symptoms, so I would consider it a comparatively unusual and not a common thing.

Q. Correct; but would it be any more unusual than an emotional [48] upset being the precipitating cause? A. In my impression, much more.

Q. Much more unusual. Perhaps I should have rephrased that question a little bit, Doctor. You spoke of reflexes. Let me ask you this question: I will ask you whether or not it is a fact that a reflex arising from a viscus such as a gallbladder is a cause of angina or should we say a coronary insufficiency or an anoxemia of the ventricular muscle of the heart?

A. Let us be more specific and let us don't put the "viscus" in because that can mean bladder or anything else.

Q. I mean a viscus such as a gallbladder.

A. All right. A gallbladder can reflexedly give you a disturbance in the coronary blood flow.

Q. Is this not one of the common precipitating causes?

A. No, I do not think it is a common precipitating cause. I think it is a very unusual precipitating cause.

(Deposition of Homer P. Rush.)

Q. Doctor, assume the facts to be that Mr. Lyons on May 12, 1950, after hurrying across a lumber dock had pain in the right and left arms.

A. This is when?

Q. May 12, 1950; had pains in the right and left arms to the extent he could not hold a phone.

A. This is different than the other time. He had pains and could not hold a phone. [49]

Q. No, this is the same time. This is back in 1950.

A. I believe you told me this was February 4th or something like that before.

Mr. Kriesien: Off the record.

(Discussion off the record.)

Q. (By Mr. Kriesien): Doctor, assume the facts to be that Mr. Lyons on May 12, 1950, after hurrying across a lumber dock had pains in the right and left arms to the extent he could not hold a phone; that his condition was diagnosed as acute anxiety tension, and Mr. Lyons was advised that he ought to slow down.

On February 3, 1953, Mr. Lyons had constricting chest pains; on February 4, 1953, he had constricting chest pains with radiation down the arms and was given a prescription of nitroglycerin; on February 5, 1953, had pain in a lesser degree and was advised by his doctor he could go on a fishing trip provided he did no extensive work such as tramping around fields or heavy lifting; that on February 10, 1953, Mr. Lyons was found cyanotic

(Deposition of Homer P. Rush.)

and pulseless under circumstances you have described; that Mr. Lyons was experienced in the handling of guns and had suffered other injuries in the past more severe than the superficial facial injuries sustained on February 10, 1953.

Assume the medical findings of the Mexican autopsy, including the gallstones. [50]

Based upon those facts, Doctor, could you give an opinion as to the most probable precipitating cause of a coronary insufficiency causing an anoxemia of the ventricular muscle of the heart, producing a ventricular flutter or fibrillation which ended in death?

Mr. Maguire: Just a minute, Doctor; let us read the question.

(Question read.)

Mr. Maguire: We object to that for the reason, among others, that it wholly omits the sudden and unexpected discharge of a shogun right against the almost immediate vicinity of his right neck, face, ear and head.

Mr. Beebe: And it further omits the stipulation of counsel that both of the gallstones mentioned in the Mexican report were free.

The Witness: Now may I ask you a question? Is that fair?

Mr. Kreisien: Certainly, Doctor.

The Witness: These pains in February, 3rd and 4th, 1953, he was free of pain, I assume, between 1950 and 1953; for three years he had no troubles?

(Deposition of Homer P. Rush.)

Mr. Kriesien: I cannot answer that question, Doctor. I do not have——

The Witness: I mean, I assume that by the story you are giving me.

Mr. Kriesien: Off the record. [51]

(Discussion off the record.)

Mr. Kriesien: Back on the record.

The Witness: As I interpret this question, this man had pain in May, 1950, and again in February, 3, 4 and 5, 1953, all of which I understand were supposed to be caused by anxiety tension. These pains, as I understand it, were chest pains down the arm and of a constricting nature. Nitroglycerin was prescribed, although we do not know it was ever used to relieve the pain or not. As I understand it, we do not know what precipitated the pain; that the first incident of 1950, it would be a little bit difficult for me to feel that the pain in May, 1950, was caused by coronary insufficiency or angina, if he had been free from pain for the next three years, living the life that I know he led which was that of a very active, energetic businessman. The pain that occurred in February, 1953, is not described with enough detail to call it angina, and the only earmark we have is the fact that nitroglycerin was prescribed. I assume that his doctor felt there must have been some indications towards this being an anginal affair or he would not have prescribed nitroglycerin although nitroglycerin will relieve the

(Deposition of Homer P. Rush.)

esophageal pains from the lower end of the esophagus and gallbladder pain as well as angina. The information is entirely too inadequate to give us too much of an opinion, but I would feel that the last part of it, that is, the story in 1953 would be indicative [52] that he had coronary insufficiency at the time mentioned.

Mr. Beebe: Just a moment. I do not believe that that answers the question after detailing all that, Doctor. The question was what was the precipitating cause on the fatal occasion, was it not?

Q. (By Mr. Kriesien): My question was, could you give an opinion as to the most probable precipitating cause of the angina which caused the anoxemia of the ventricular muscle——

A. It would be my opinion that the emotional reaction from the explosion of the gun next to his face would be much more logical to have been the precipitating factor of his final episode than to think of it as coming from any other reflex.

Q. Then, Doctor, as I understand your answer, you would say that an emotional episode was the more probable——

A. No.

Q. Pardon me?

A. Just don't use the term "emotional upset." Let us use the term "emotional factor."

Q. The emotional factor was the more probable of the precipitating causes as against an angina pectoris, a gallbladder colic, or some unknown factor?

A. I do not think that is a fair question because

(Deposition of Homer P. Rush.)

we feel that whatever the precipitating factor was he could have well had angina of which we have no way of proving, and you have objected to my using the term because it is a symptomatic [53] term, and I agree with you. It is wrong to use so I think we should consider the fact that a disturbance in coronary blood flow that caused a disturbance in the mechanics of the heartbeat that produced a disturbance in ventricular rhythm which led to a congestive heart failure which was the cause of his death, and I believe the precipitating cause of this marked emotional fear upset was caused by the explosion of the gun next to his face. Does that answer it?

Q. Partially, Doctor.

Let me ask you this question, then: Then, as I understand it, it is your opinion that this emotional reaction or upset—I am not quibbling over the words there—was the more probable cause of a disturbance in the coronary blood flow rather than an angina pectoris, a gall bladder colic, or some unknown cause or factor?

A. When you put the term angina pectoris in it, you are adding a term into it which I believe is part of a general chain of events, and I cannot say that the emotional factor caused the death and not angina pectoris because I believe he did have angina pectoris although we have no proof for it. I don't believe gall bladder disease or some other unknown reflex was responsible for it.

Mr. Kriesien: Off the record.

(Deposition of Homer P. Rush.)

(Discussion off the record.) [54]

The Witness: Well, it seems to me that this man had a sudden explosion of this powerful shotgun by his face, the cause of which I don't know but that he must have been upright because there was no evidence in the brush or dirt to indicate that it exploded when he was down, that the superficial wound was very slight, and, therefore, it was the emotional mental fear of what went on over the next two or three seconds that caused the reaction that I believe caused a change in coronary blood flow that produced a chemical change in the ventricle that could allow for ventricular fibrillation to develop, which did in all probabilities, and produced a passive congestion as has been demonstrated with autopsy, which was the cause of death.

Q. That opinion, of course, Doctor, is predicated on the fact that the shotgun was suddenly exploded prior to a seizure of an angina; is that correct? A. Correct.

Q. I believe you have already stated that such an explosion would not cause death in an individual with a normal heart; that the heart condition contributed to the death; is that correct?

A. I think—

Mr. Beebe: Just a moment now. I want to object to that upon the ground that the form of the question—first, upon the ground that it misstates the doctor's testimony. He testified [55] that it was possible for this to occur to any person, a person

(Deposition of Homer P. Rush.)

even with a perfect heart, for the shock to bring about death, and upon the second ground, further ground, that the word "contributing" is used without defining the sense that the word "contributing" is used

Mr. Maguire: That is a legal conclusion. It carries a legal implication with it that is unfair. The witness spoke of contribution in medicine, and what contribution in law is is entirely different.

Mr. Kriesien: I will rephrase it, then.

Q. I believe you testified before that an explosion such as the discharge of a shotgun would not, except in a very rare case, cause death in an individual with a normal heart?

A. That is right.

Q. I will ask you whether or not in your opinion the condition of Mr. Lyons' heart as revealed by the medical case history file and the Mexican autopsy report was a contributing factor, medically speaking, in the death of Mr. Lyons?

A. I believe it is correct to state that if this man had not been in the condition he was he would not have had this reaction from the shotgun going off next to his ear, meaning by that that he had the condition of a coronary insufficiency, an aortic insufficiency, which is also exceedingly important, I believe, in this particular case, to allow the reflex reaction from emotional tension to have been much more probably than it would [56] have been in a normal individual by a great per cent. Does that answer the question?

(Deposition of Homer P. Rush.)

Mr. Kriesien: Thank you. Yes.

Q. As a matter of fact, if it were not otherwise, Doctor, most of the soldiers would die in combat from the shock of explosion; is that correct?

A. I do not think that there is any doubt but what, as I say, I have never heard of an individual that died from the shock of a shot of a gun going off by him in my life, and outside of this group that I know of in the South Pacific is the only time that I know of, apparently, from mental processes producing death in a normal individual, so I know it can happen. I think you have heard the story of a man scarred to death.

Q. Oh, yes.

A. I am sure that is correct. It can happen.

Q. Doctor, in your many years of practice and specializing in heart conditions have you ever had occasion to certify on a death certificate that an emotional upset was the sole and independent cause of death?

A. No, I never have.

Q. Approximately how many death certificates have you signed during your years of practice?

A. I wouldn't know.

Q. You have been practicing many years, though, Doctor. It [57] has been a good many.

A. I have practiced—I have been licensed since 1921. There have been many of them.

Q. Doctor, you state in your affidavit of July 10, 1953, "In my opinion, the sequence of events and the time elements involved therein eliminate

(Deposition of Homer P. Rush.)

any probability that the onset of the heart attack precipitated the accidental discharge of the shotgun, but, on the contrary, established with reasonable certainty that the sudden explosion of the shotgun precipitated that onset of the heart attack."

Now, your opinion as to these sequence of events will be the ultimate fact for determination by the jury, but I would like to know the facts upon which you have based that opinion.

A. The facts were based upon this: One, that I had been with that man over a period of 48 hours or more, and he seemed perfectly well; two, that morning he stated he felt exceptionally fine, walked up a hill with me and showed much less effort as regards shortness of breath than I did; three, that he was obviously an excellent shot because I saw him kill several doves when I was standing by him; four, when we changed positions I was taken over some 50 yards or so, and on these particular two shots that we are speaking of, the first one, I saw a dove fall, the second one, I did not, which occurred comparatively soon after the first one, much sooner than I would [58] have expected him to shoot at a second group of doves. I had my back turned to him. He might have knocked the dove down. I might not have seen it. I went through a mental process of wanting to go back and razz him for not letting a few doves light in the tree by shooting so frequently, but I heard this stridulous breathing, and it was a very quiet country we were in. There was no noise around.

(Deposition of Homer P. Rush.)

We could holler back and forth. I did not see him because of the brush, and there was a time element of 10 to 15 seconds, I believe a fair estimate, before I heard this stridulous breathing after I heard the man shoot. I am certain there could not have been another gunshot or I would have heard it. I assume the first gunshot must have been the one that went up by his face. It must have gone off when he was upright because when I saw him he was lying face down under the edge of this mesquite brush. At that time he was still alive and with the symptoms I have previously described. I felt that it must have been the gunshot that precipitated the attack, or I would have heard stridulous breathing first and the gunshot second, or I would have found evidence that he had fallen and the gunshot would have had to have disturbed some of the countryside around it, either the ground or brush, none of which we found.

Q. Doctor, is there any specific period of time within which stridulous breathing develops after, say, an attack of angina pectoris or coronary insufficiency? [59]

A. I don't believe that it is a symptom necessarily of angina or coronary insufficiency. If we have an adequate amount of coronary insufficiency, the decreased blood flow through the ventricle so ventricular fibrillation can occur or ventricular flutter so that we do not get any forcing of blood out into the systemic circulation or pulmonary circulation that we would expect but a few seconds to

(Deposition of Homer P. Rush.)

occur before evidence of disturbed breathing would occur. This disturbance of breathing is not an evidence of coronary insufficiency but an evidence of heart failure, and the heart in this case was caused by, in my opinion, the coronary insufficiency. I think we can go further and state that an experimental animal, if you ligate his anterior coronary, as a dog, 50 per cent of them will go into ventricular fibrillation within but a few seconds.

Mr. Beebe: Less than 10 or 15?

The Witness: Definitely.

Q. (By Mr. Kriesien): What about the other 50 per cent, Doctor?

A. I cannot answer that. I know that the men that are doing this work always worry exceedingly about ligating the anterior coronary because they lose over half their animals right now even though they are doing everything they can to protect them.

Q. Would the development of stridulous breathing vary in individuals? [60] A. It would.

Q. The time element would vary?

A. It would.

Q. Could you have heart failure to such an extent that it would render one unconscious or unable to hold a shotgun and still not precipitate the stridulous breathing within this period of 10 or 15 seconds?

A. I think that would be possible, but I do not think it was probable.

Q. Why do you not think it was probable, Doctor? A. Pardon?

(Deposition of Homer P. Rush.)

Q. Why do you not think it was probable?

A. Because I do not believe he would become unconscious that quick. I cannot imagine an individual that knew firearms like Jim allowing himself to get in that position. I think if he had felt a heart attack he would have thrown that gun to the ground. I do not think he would have held it.

Q. Of course, he was not holding the gun when it was discharged, was he, Doctor, to inflict the wounds that were on him?

A. No, it is my opinion he was not, and the reason I do not think he was is because I think he slipped, and this thing slipped through his hands and exploded. That is, he was not holding the gun in a proper position. He must have been holding it against him or it would not have gone up alongside [61] of his face.

Q. Doctor, when you arrive at that opinion do you take into consideration the fact that in May of 1950 he had pain in the arms to such an extent that he could not hold a telephone?

A. I did not when I arrived at the conclusion originally.

Q. Would that alter your opinion?

A. No, it would not because I cannot understand a man that has serious heart disease from 1950 to 1953 being free of symptoms for three years and then having an attack like this.

Q. But Mr. Lyons had never indicated to you in your conversation that he had been apprized of the fact that he had a heart condition, did he, Doctor?

A. He had not.

(Deposition of Homer P. Rush.)

Q. So then if he had an onset of pain there would be no reason for him to anticipate that it was a heart attack, would there, Doctor?

A. I do not know him well enough to answer that question.

Q. Well, you gave the opinion, Doctor, that if a man of Mr. Lyons' experience with shotguns, if he felt a heart attack coming on he would throw it away? A. I think he would.

Q. That was the reason I asked the question would he know he was suffering a heart attack if he had an attack of angina pectoris. [62]

A. If he had been told he should take nitroglycerin after these several spells you have previously described, I would think that he at least suspected he had some trouble.

Q. But, notwithstanding, he at least assured you the day before the occurrence that he was in good condition or had been assured he was in good condition and needed merely rest and relaxation?

A. That is correct.

Q. So, apparently, he had not been advised that he had a heart condition?

A. I would think that is correct, too.

Q. Doctor, just a few more questions here. With reference to the hypothetical question I asked you and your statement of your inability to determine whether the nitroglycerin was administered for an angina pectoris condition, I would like to call your attention to the fact that the doctor advised him

(Deposition of Homer P. Rush.)

that he was to have rest and relaxation, was to refrain from exerting himself by any extensive lifting or tramping through the fields. Is that a prophylaxis for an angina pectoris condition?

A. It would be a reasonable advice.

Q. Did you take that into consideration when you answered as you did to the hypothetical question I propounded?

A. I did, because he was not tramping through the fields. He had not moved, I do not think, over 30 yards in this whole thing except the one time he went up that little hill which was some 30 minutes before this happened.

Q. Doctor, I was not referring to that particular fact. I was referring to the statement about whether you could determine the precipitating cause of the onset of this condition.

A. If it had been due to effort per se, like his tramping, I would have expected it to have happened when we walked up this hill, and I could see no signs that he had difficulty, and that is to say 20 to 30 minutes later that this episode occurred.

Q. How long were you separated from Mr. Lyons before this occurrence, approximately, Doctor?

A. Five to ten minutes.

Q. You, of course, do not know what he was doing during that time as far as walking back and forth?

A. No, I do not.

Q. Or anything of that nature?

A. All I know is he shot one dove because I saw it fall.

(Deposition of Homer P. Rush.)

Q. Doctor, if you had been in possession of all the material facts that were contained in Mr. Lyons' medical case history file and the complete findings of the Mexican autopsy, would your opinion have been the same as contained in your affidavit as to the sequence of events?

A. No, there would have been a change in the sequence of [64] events. I would have stated that it was my opinion that the fear or emotional or mental factor, whatever you wish to call it, from the shotgun going off next to him started a chain of events which was followed by probably some coronary insufficiency with a decrease in blood flow and an increase in heart rate or tachycardia which is very common any time one has fright and the fact that he had involvement of his aortic valves which I did not know about, therefore much less normal pressure to maintain coronary circulation; that the change in the aortic valves was probably a definite factor in producing the coronary insufficiency which later led to changes in the metabolism of the ventricular muscle that produced a fibrillation, arrhythmia, that caused passive congestion that caused his death because I honestly believe the fact that he had this involvement of his aortic valves is a definite factor, and I think had he not had that the coronary insufficiency would not have been enough to cause death under this particular strain. I think that should be taken into consideration.

(Deposition of Homer P. Rush.)

Q. Do you find the aortic valve in the condition Mr. Lyons' was in in a normal heart?

A. No, it was not a normal heart to have valves like that as reported on the translation of the autopsy.

Mr. Kriesien: That is all.

Mr. Beebe: As I understand it now, we can assume it has [65] been stipulated that with respect to both gallstones they were free, and that was the basis of your question, and that is a stipulated fact in the case?

Mr. Kriesien: Free at the time the autopsy was performed.

Mr. Beebe: That is right; you brought it up through the autopsy.

Mr. Kriesien: Correct.

Mr. Beebe: At the time of the autopsy both of these were free; both of those stones were free?

Mr. Kriesien: Well, now, what do you mean by that term "free," Mr. Beebe?

Mr. Beebe: It came from your doctor's translation. There was a short sentence, "Both were free." I mean Dr. Serrano. Both were free.

Mr. Kriesien: That is the exact words he used. For the purpose of the record I will stipulate to whatever the supplemental report states.

Mr. Beebe: Well, let us get it. Here is a copy——

Mr. Kriesien: However, in view of the fact that you brought that up there is one question more I would like to ask the doctor.

Mr. Maguire: Let us get this settled first.

(Deposition of Homer P. Rush.)

(Discussion off the record between counsel.)

Mr. Beebe: It is stipulated that both of the gallstones at the time of the autopsy were free? [66]

Mr. Kriesien: Correct.

(Further discussion off the record by counsel.)

Cross-Examination

By Mr. Beebe:

Q. Dr. Rush, I want to go in a little bit into your qualifications. What was your premedical education, Doctor?

A. University of Nebraska.

Q. What degree did you take? A. A.B.

Q. What was your medical education?

A. University of Oregon, M.D.

Q. What year did you graduate? A. 1921.

Q. After your graduation did you undertake any post-graduate studies, internships, and so forth?

A. Yes, I did.

Q. What were they?

A. I interned at Emanuel Hospital in Portland, went back to the University of Chicago and took physiology, took my Master's degree in physiology, came back to the University of Oregon, taught physiology for four years, then transferred to the Department of Medicine on half-time, became associate of Homer Coffin, went to the University of Vienna and took [67] post-graduate work in medicine, returned to Portland in 1928.

(Deposition of Homer P. Rush.)

Q. You mentioned Dr. Homer Coffin. You were an associate with him. What was his practice?

A. Internal medicine.

Q. Internal medicine. At the University of Vienna what did you study?

A. Internal medicine, but most of my work was done on cardiology.

Q. Have you a specialty in the practice of medicine, Doctor?

A. I have. My interest is in cardiology.

Q. Is that a branch of another specialty?

A. That is a part of internal medicine.

Q. Internal medicine. Do you hold any certificates or anything of that nature evidencing your specialty?

A. Yes, I am a Diplomate of the American Board of Internal Medicine and am certified as subspecialty in cardiovascular disease.

Q. Dr. Rush, in your practice have you largely limited your practice to cardiovascular disease?

A. About 70 per cent of it.

Q. About 70 per cent. When we refer to cardiovascular disease, do we mean all heart cases?

A. The big majority of them. 95 per cent of it would be heart.

Q. Doctor, are you on the staff of any [68] hospitals?

A. Yes. I am on the staff at Good Samaritan and St. Vincent's and the, I guess they call it, associate staff at Providence, and I have been a consultant for the Veterans Administration. I believe

(Deposition of Homer P. Rush.)

my official title was consultant in internal medicine and cardiology for the Western District.

Q. Doctor, what, if any, positions do you hold upon the staff of any hospitals you have mentioned?

A. Just that of attending man and consultant to the V.A.

Q. Doctor, are you connected academically or as an instructor or professor of medicine at any university or anything of that kind?

A. Yes, I am a clinical professor of medicine, University of Oregon Medical School, and I am head of the section of, I think it is called cardiovascular disease, I am not sure, something like that.

Q. How long have you been clinical professor of medicine at the University of Oregon Medical School?

A. I cannot answer that truthfully. I have been teaching at the University of Oregon Medical School since 1919 with some interruptions when I have been East. I came on up through physiology as an instructor and ended up as assistant professor and then went over to the Department of Medicine as an instructor and then came up as an associate and as a clinical professor and as an associate professor and as a clinical professor, and have held that since about 1942, I think, but I am, I would not [69] know—that information is all available. I am guessing at the dates.

Q. How long have you been the head of the section on cardiovascular diseases at the University of Oregon Medical School?

(Deposition of Homer P. Rush.)

A. Since it was formed.

Q. Approximately how many years has that been, Doctor?

A. About—when did the war end?

Mr. Maguire: 1945.

The Witness: About 1948, I guess, something like that I guess it was when it was started. Dr. Lewis took the department over, and we divided it into divisions.

Q. (By Mr. Beebe): Doctor, have you had occasion to write any treatises or portion of treatises, articles for periodicals, medical periodicals and journals and so forth? Have you done any work of that nature? A. Yes.

Q. In your field, your specialty of cardiovascular disease? A. Yes, I have written a few.

Q. Can you give me some idea of what you have written, Doctor?

A. Well, I wrote the last textbook that was put out by Williams & Wilkins. I wrote the chapter on Subacute Bacterial Endocarditis with Dr. James and Dr. Frisch. I have written several articles that are in the local journals, one on the use of digitalis, one on the hypothyroid heart, one on auricular [70] fibrillation, several others. I have got a list of them.

Q. That is all right, Doctor, just to get a general idea.

A. I do not know what all it is.

Q. In connection with other members of your profession who desire to be qualified or admitted to practice the specialty of internal medicine or

(Deposition of Homer P. Rush.)

cardiovascular disease, do you have anything to do with the examination of such persons as to their qualifications? A. No, I do not.

Q. Or have you had in the past?

A. In the past I have sat on the Board of Examiners for both the American Board of Internal Medicine and the section on cardiovascular disease. I am not a member of either board, but I have been Examiner on both boards.

Q. Doctor, during the course of your examination by Mr. Kriesien the term "angina" and "angina pectoris" kept recurring, and there appeared to be a little something about that that caused some disturbance, as I gathered from your testimony, something to this effect, that angina pectoris is not medically speaking a disease or any particular defect in the heart or condition of the heart, but it is a syndrome of symptoms that might refer to a number of things. In other words, it is not a term of art in this case as tuberculosis, for example, would be?

A. I think that is a correct statement. It is a disease [71] syndrome or clinical syndrome.

Q. What do you mean by that?

A. It is a group of symptoms that have been found over a long period of time to tend to indicate some definite disturbance such as we speak of Cushing's syndrome which has to do with a disturbance in glandular activity. It was thought by some to be pituitary, by others to be adrenal, but a certain group of symptoms and findings.

(Deposition of Homer P. Rush.)

Q. Doctor, then, for example, a syndrome which might be described as angina pectoris might point to any one of two or three different types of cardiovascular disease, might it not? In other words, it might point to auricular insufficiency or coronary insufficiency; it might point to a coronary occlusion, or it might point to a ventricular fibrillation?

A. No, I do not believe that statement is quite correct. I think it is fair to say that we have gradually come to assume that there are three types of diseases or stages of disease in the coronary arteries of which the first one we usually term angina pectoris, and it is associated with pain but usually not—but not necessarily associated with any change that can be found in the heart or the coronary arteries at autopsy.

Coronary sclerosis is the next stage in which you may have pain of an anginal character. It is thought that it may last a little longer. It is not relieved so easily by [72] nitroglycerin, and there is always autopsy findings of changes in the coronary artery.

Coronary occlusion is where there has been a definite blockage of the circulation of the coronary arteries, and it has caused a destruction of some area in the heart muscle depending upon which coronary artery was involved, and, clinically, there has been an attempt to divide the thing into these three chains. Your statement would have been correct, I think, twenty-five years ago because it was felt at that time that angina might be caused by aortic disease. Halbutt thought that was the reason for it, but after about 1921 in this country we began

(Deposition of Homer P. Rush.)

to realize what really coronary thrombosis or occlusion was with myocardial infarction and began to differentiate.

Q. What I am driving at, Doctor, the term angina pectoris itself to you would not point necessarily to any one particular stage or type of heart disease, would it?

A. Yes, it would tend to point to the more—it would not point to, as I would use it, an occlusion or thrombosis or infarction. I would use it somewhat as a synonym for coronary insufficiency which so frequently occurs with angina, and that is the way I used it in this affidavit, which is really not a correct use of it. I did not use it correctly.

Q. So that when used with absolute precision it is merely, as I understand, a name for a collection of symptoms which may [73] be referable to one of several conditions of the heart?

A. It is referable to a certain set of symptoms, but they are probably all referable to the circulation in the heart.

Q. Now, then, Dr. Rush, during the time you were with Mr. Lyons just preceding this February 10th, the date of his death, did you have occasion to take meals with him?

A. Yes, I think we took all our meals together.

Q. Did you make any observation with respect to his eating and specifically to the amount that he ate as to whether or not he ate heartily and whether he ate the general fare that was provided or had a special diet?

(Deposition of Homer P. Rush.)

A. No, he ate like all the rest of us, and I would say he ate heartily and ate all food that was prepared. There was no special diet prepared for Jim.

I can mention that because Mr. Irwin was on a special diet and had special food so that it was definitely noted that the rest of us lived on the ordinary chow, and Hoddy stayed on his salt-free diet.

Q. Now, then, Doctor, if a person has gallstones which are in such a position lodged in a duct or in a situation to cause gall bladder symptoms, what type of complaint will he have?

A. Well, the most common complaint, of course, would be a biliary spasm, biliary duct spasm, which would be characterized by pain that is usually quite severe over the upper right quadrant of the abdomen or lower right chest and is referred [74] back under the right shoulderblade. Now, those same individuals might have some degree of so-called chronic dyspepsia in which they would have more than the ordinary amount of gas and would have episodes when they might have general epigastric distress that would be rather indefinite and usually tend to avoid fats and greases and things of that type.

Q. Now, then, in this case if they have this pain that you mentioned as being under the right quadrant and up under the arm is that a rather severe pain, would you say?

A. Yes, the gall bladder colic is very severe.

Q. And a person normally having such a pain,

(Deposition of Homer P. Rush.)

would they be inclined to be quiet about it, or would they say something about it or give some involuntary exclamation?

A. I believe if they had an acute spasm there would be no question but what they would holler for help.

Q. If a man were in the company of two doctors of internal medicine on a ship and had such an attack of pain, do you believe that the normal conduct would have been for him to mention it to one or the other of those doctors?

Mr. Mize: I object to that as certainly calling for a conclusion.

Mr. Beebe: This is cross-examination, Mr. Mize. It is cross-examination.

Mr. Mize: Go ahead. [75]

Mr. Kriesien: I do not think it falls in that category, but go ahead.

The Witness: What is the question?

Mr. Beebe: Never mind. I will withdraw the question.

Q. Doctor, isn't it a fact that if the type of pain which is ordinarily associated with disturbance in the gall bladder such as we have been discussing here, doesn't that pain come on and then grow increasingly worse?

A. Well, if they had an acute attack of gall bladder colic, gall duet colic, it would.

Q. This other symptom that you mentioned if the situation is a chronic one, of dyspepsia, is it?

A. That is the term I used.

(Deposition of Homer P. Rush.)

Q. Yes, they have trouble with gas?

A. Right.

Q. Is that accompanied by belching and flatulence? A. Usually.

Q. Did you have occasion to observe any such symptoms on James Lyons when with him?

A. I did not. I did not see any evidence of any general digestive disturbances that he exhibited.

Q. Dr. Rush, I believe along toward the end of your direct examination you may have misspoken yourself. You said that you believed that the heart attack that he had—I will call it that for the want of a better term at this time—probably [76] followed the first shot. Do you mean to say the second shot? A. No, I meant the second shot.

Q. Yes, because you had said that previously.

A. Yes, that is what I meant, what I meant to say, that he had shot several times before these two shots only that I was talking about.

Q. There was one shot and then about ten seconds, and then there was another?

A. That is right. There was one shot that was followed later about ten seconds or so by the second shot.

Q. Dr. Rush, when you returned to where Mr. Lyons was lying I believe you testified that he was face downward? A. That is right.

Q. With the shotgun underneath him, the stock protruding from a point about at the right hip?

A. That is right.

(Deposition of Homer P. Rush.)

Q. And the barrel protruding below the point of his left shoulder; is that correct?

A. That is right.

Mr. Maguire: Protruding below it; what do you mean?

Q. (By Mr. Beebe): From a point below the left shoulder in a diagonal position from left to right and upward across his body; is that right?

A. That is right.

Q. Doctor, can you tell us approximately how much of the [77] shotgun barrel was protruding beyond the point of the left shoulder?

A. I don't believe I could. There was a definite amount protruding, enough so that you could see it, but I don't recall as to whether it would have been four inches or eight inches or—I would make a wild estimate of at least six inches or more.

Q. As I understand it, he had had this stertorous breathing for a period of time that it took you to think "Can that be a mad bull," and to wonder about momentarily and then to walk toward him, which took approximately 30 to 60 seconds; is that correct?

A. Yes; I don't believe that it took any more than 60 seconds.

Q. For the walk? A. Yes.

Q. When you arrived there, you found that he was pulseless? A. Right.

Q. That there was proof of pulmonary edema. To me that is sort of a medical conclusion. What was the evidence of it?

(Deposition of Homer P. Rush.)

A. I mean by that, in this breathing you could hear moisture, a wheezing in his chest something like, somewhat like an asthmatic might have, and with it a whitish frothy sputum was coming from his mouth that had blood tinges in it.

Q. That indicated to you pulmonary edema?

A. That is right. [78]

Q. By pulmonary edema, does that mean a swelling in the lungs?

A. That means a collection of fluid in the air cells of the lungs that occurs with passive congestion or heart failure.

Q. That is then a symptom of passive——

A. It is a sign of passive congestion.

Q. He was cyanotic. By that you mean he was blue?

A. That is right.

Q. The right side of his face was bleeding?

A. Yes, it was bloody.

Q. Bloody. He was unconscious?

A. That is right.

Q. Did you observe anything as to the condition of his upper abdominal muscles?

A. We loosened, of course, his shirt in order to attempt some artificial respiration and to be sure that we had no constricting bands, and he was merely going through the forceful contractions of a marked respiratory difficulty in which there was contraction of his abdominal muscles as well as his chest muscles.

Q. Is that significant. or does it indicate at all?

(Deposition of Homer P. Rush.)

A. I would not say any more than any aortic dysrhythmia associated with acute heart failure.

Q. Was it a sign of acute heart failure? Did you so interpret it at that time as one of the signs? [79]

A. I felt that it was.

Q. Pardon? A. I felt that it was.

Q. Doctor, did you have any medical instruments with you, a stethoscope or anything?

A. No, I did not.

Q. After you determined that he was pulseless it was then that you felt the position over the man's heart? A. That is right.

Q. You felt a sensation like the purring of a cat, kind of a little vibration?

A. Yes, it was really, oh, coarser than the purring of a cat. It was a feeling as though there were something moving underneath, but it was not with any regularity.

Q. It was not a beat?

A. No, it was not a beat at all. It was more of a constant type of a thing. The vibrations, of course, were definitely longer than the purring of a cat. That was probably a poor word to use, but that is the first one I thought when he asked me. Oh, it might be like an individual that had a twitching in a leg muscle which would twitch back and forth. You put your hand on it, and you can feel it, only underneath the chest and not in the chest.

Q. Did you reach a conclusion at that time, Doctor, a medical conclusion, that this thing that you were feeling, this vibration, [80] was prob-

(Deposition of Homer P. Rush.)

ably a ventricular fibrillation? A. I did.

Q. You reached that medical conclusion at that time based upon these things that you had seen and the thing that you had felt there with your own hand? A. That is right.

Q. Now, then, Doctor, did you at that time form a medical opinion based upon what you saw and felt there and upon what you had observed of James Lyons as to what was causing his death and the probable precipitating cause of the death?

A. I did. I made the remark to Bob Parrick after it was obvious he was dead and we were walking up and down the road and somewhat disturbed that I did not believe that this was a gunshot wound that caused his death, and I was wondering in my own mind whether, if he might have had a pellet that went into an eye, into the brain, that we had not seen or would not, but I felt it was a heart death on the way he acted clinically.

Q. Doctor, had you come to any medical conclusion at that time as to the probable precipitating cause of the heart death and probable physiology of the heart death after the man had died?

A. Yes, I did because after talking to Mr. Parrick he told me that this man had been given some little white pills to put under his tongue. I said, "When, and do you know anything [81] about it?" He said, no, except that he showed them to him maybe a day or two before, and that made me wonder then if he had not had some evidence such as angina or coronary insufficiency, and if that be

(Deposition of Homer P. Rush.)

true, whether the marked emotional reaction from having this gunshot fire, go off alongside of his face, I felt probably was the result of his tripping or an accident because the explosion was in the air. There was nothing to indicate it was on the ground, and, as I mentioned before, the time element was such that I feel the explosion went off before the heart attack; therefore, it must have been an emotional factor that precipitated the chain of movements which I have mentioned two or three times this afternoon, and that I would have expected to have found a coronary occlusion and the myocardial infarction that had followed it, or that he just had a ventricular fibrillation secondary to the marked coronary insufficiency, and the autopsy, of course, revealed the latter.

Q. Doctor, the white pills that Mr. Parrick spoke to you about, in forming your opinion at that time you assumed that those were nitroglycerin?

A. I did.

Q. And the fact that Mr. Kriesien expect to prove that he had had glycerin prescribed, that would have formed—which he asked you on your examination—would have formed the same predicate you had then which you got from Mr. Parrick; [82] is that correct? A. It would.

Q. The same predicate for your opinion, I believe? A. Yes.

Q. Did you answer my last question, Doctor?

A. I said it would.

Q. Doctor, would it be fair to say, then, that

(Deposition of Homer P. Rush.)

based upon what you had seen, plus the fact that the man had apparently been taking nitroglycerin and the other factors that you have mentioned, you came to the conclusion that the shotgun going off right close to his head unexpectedly at a time when he did not expect it, causing the burning and the superficial wounds and the emotional shock and fear, had been the precipitating agent that had operated to bring about a heart death either by way of coronary thrombosis with a myocardial infarction or by a ventricular fibrillation and coronary insufficiency. Is that—do you understand—

A. Yes, that is almost correct.

Q. Almost correct; correct it for me.

A. I think that he had ventricular fibrillation regardless of whether he had—either way.

Q. I see.

A. But I rather thought that they might find evidence that he had a coronary occlusion with a myocardial infarction which was not found, but the coronary insufficiency was. I did not [83] have any idea at that time of aortic insufficiency.

Q. In other words, it was your opinion that it was one of two things? A. That is right.

Q. But that in either event the thing that had started the death in motion had been the discharging of the shotgun under the circumstances that you have mentioned; is that correct, Doctor?

A. That is correct.

Q. Doctor, assume that on the autopsy that was

(Deposition of Homer P. Rush.)

performed a literal translation of the Spanish report on the thorax would be as follows:

“On raising the chest and the sternum and rib junctions, there is found ossification at the chondral costal junctions.”

Assuming that, Doctor, in your opinion did the ossification of the chondral costal junctions have anything to do with his death?

A. No, they did not.

Q. Continuing now with the literal translation from the Spanish autopsy:

“Many and thick pleural parietal adhesions to the back side of the sternum and to the left side of the thorax.”

Assuming that to have been found on the [84] autopsy, in your opinion would that have had anything to do with the cause of his death?

A. I do not believe so.

Q. “Right lung is found free.” Is that significant on the question of death?

A. No, I do not think that would have any indication as to what he died from.

Q. “Both lungs are congested. On cutting a section there is a seeping or draining of black liquid blood.”

Is that significant?

A. I think that would be indicative of passive congestion that was present in his lungs.

Q. Will you describe the connection with the condition in his lungs and the coronary insufficiency, if any?

(Deposition of Homer P. Rush.)

A. Well, the condition in his lungs is evidence of congestive heart failure regardless of what causes it. Coronary insufficiency is merely the factor involved that caused the heart muscle to fail so that it could not maintain its ordinary blood circulation and hold back pressure into the lungs that filled up with blood. That caused passive congestion, and two places you usually get passive congestion in acute cases are in the liver and in the lungs. In acute cases, chronic ones, of course, you will get edema in the extremities and a lot of other things. [85]

Q. Doctor, continuing the literal translation:

“Left upper and lower lung lobes were functioning.”

Mr. Maguire: I think I corrected that.

The Witness: I cannot understand how an autopsy could make such a statement, and I presume he meant by that that they were afloat with an adequate amount of air and were not bound down or something of that sort. At an autopsy the lung is not functioning, cannot be because if it were the fellow would be living.

Q. (By Mr. Beebe): “The pericardium covered with thick adhesions to the diaphragm.” Is that significant, Doctor?

A. It might be, yes, because the pericardium as it lies on the diaphragm below should have some binding effect due to the reflection of the pericardium on the diaphragm, but normally it should be comparatively free, and you spoke a minute ago of adhesions behind the sternum and over the left

(Deposition of Homer P. Rush.)

side of the chest. I would rather assume that this man in the past had either had some accident or a pneumonia or a pleurisy that had also involved that area where the lung comes up against the heart and produced adhesions that still existed the same as the scar would exist when you cut your finger.

Q. In your opinion, Doctor, is the fact of the existence of that condition of importance in the final death here? [86]

A. I do not believe so because it is not described as being in one spot. If it described the heart, it would be something else.

Q. If a man had been in an automobile accident and had a number of broken ribs, could that have——

A. That could have accounted for it.

Q. For the adhesions? A. Yes.

Q. Continuing: "The heart surrounded by a thick cape of fatty tissues." I believe one translation said gross tissues. "The heart surrounded by a thick cape of fatty tissues." What does that mean?

A. That means an individual who had a reasonable amount of fat in his pericardium, which is a common thing you will find in an individual a little on the overweight side.

Q. Do you believe that that condition was of importance on the date of his death?

A. I do not.

Q. "Let ventricle lightly hypertrophy."

Mr. Kriesien: "Slightly," isn't it?

Mr. Beebe: The literal is lightly, and I under-

(Deposition of Homer P. Rush.)

stand that the Spanish sometimes use lightly when they mean slightly and "heavy" when they mean "greatly," but lightly or slightly hypertrophy.

"There was a covering and cementing of the [87] aortical sigmoids with atheromatous deposits, the left auricular-ventricular ring slightly dilated."

Doctor, what would be meant by aortical sigmoids, assuming that that is the language of an autopsy doctor, an autopsy surgeon, just the two words "aortical sigmoids"?

A. Aortical sigmoids or valves.

Q. Would there be any other of the physical structures of the heart that could be referred to as aortical sigmoids other than the sigmoid valves?

A. Not to my knowledge.

Q. What would the term "atheromatous deposits" mean?

A. That refers to the plaques that are present in the lining of the blood vessels that are associated with also hardening of the arteries.

Q. Would it be synonymous to say arteriosclerotic deposits?

A. Generally speaking, yes. There are four types of arteriosclerosis, but the common one is these atheromatous plaques.

Q. This is a more specific description of them?

A. That is right.

Q. "The left auricular-ventricular ring slightly dilated"?

A. That meant that the valve between the

(Deposition of Homer P. Rush.)

auricle and the ventricle on the left side was a little larger than it should be normally.

Q. Doctor, continuing:

“The coronary arteries were dissected which [88] were found of diminished caliber because of atheromatous plaques.”

Now, what would that mean?

A. That would indicate that the coronary arteries were decreased in size because these atheromatous plaques had piled up on the lining of them: therefore, coronary insufficiency.

Q. Doctor, is the fact that there was a covering and cementing of the aortical sigmoids or semi-lunar valves with these atheromatous deposits, is that significant to you in the physiology of the death of James Lyons?

A. Yes, it is, because the coronary arteries— and those are the arteries that supply the heart muscle with blood—are the first branches that come off from the aorta. In other words, when the heart pumps the blood out from the left ventricle, it goes into the semi-lunar valves which are three cusps, and behind two of these cusps are little openings into the coronary arteries, and the blood that the heart gets comes from being pushed into these openings.

If you have an interference with this valve so that a decreased amount of blood comes out, then there is less blood that can go into these coronaries, or if you have too big an opening so that too much blood runs back into the left ventricle and does not

(Deposition of Homer P. Rush.)

stay up in the aorta, these cusps would come together and hold it. It cannot run into the [89] coronary ostia or openings of the coronary arteries as it normally would; therefore, you normally decrease your supply of blood. Now, knowing that you have to get increased blood flow through the heart by a great percentage every time the heart works and knowing that emotional strain is one of the things that will make a heart work, if you put an individual under emotional strain and he is short some of his blood anyhow, borderline, had enough to go on until some great strain was put on him, when you put that strain on it would be much easier for that man to develop, in my opinion, difficulty with his ventricular beat mechanism if he had a lack of coronary normal flow because of the aortic valve involvement.

Q. Now, then, if also the coronary arteries were of diminished caliber because of atheromatous plaques——

A. That means that the blood that did get into these ostia would have more trouble to get to the heart muscle because they were of small caliber.

Q. Would that latter condition increase the difficulty you have mentioned which was existing because of the deposits upon the aortic sigmoids or the semi-lunar valves?

A. Yes, it would. In other words, either one of them could cause a definite decrease of amount of coronary blood flow. When you put them both together you would have just got two factors. [90]

(Deposition of Homer P. Rush.)

Q. Now, then, if there is intense emotion because of sudden shock, fear, from your professional knowledge can you tell us to what extent percentage wise one would expect an increase in heart action in the pressure of blood that would be forced into those valves?

A. I think it is fair to say that the increased work of the heart from any emotional upset like that would be at least 25 per cent, probably a great deal more with an acute emotional upset.

I think you might liken it to an individual who has got in a dark alley with a gunman sticking a gun in his back would cause palpitation. The heart beats faster. With any type of emotional strain you get that.

Secondly, it will change your general systemic circulatory demand for blood so that the heart itself has got to put more blood out to take care of body needs, and with such a situation you would expect the coronary blood flow should be able to increase by probably way above 25 per cent on an acute emotional upset like that. As a result of overworking the heart and having a mechanism here that won't allow the heart to get enough blood, it would be a natural setup to increase the irritability of the myocardium or muscles of the ventricle which can take over the job as the pacemaker and if it comes with enough speed at one time will produce ventricular fibrillation. [91]

Q. Doctor, I take it, then, from what you have said here that this evidence from the findings of

(Deposition of Homer P. Rush.)

atheromatous deposits on the semi-lunar valves and the diminished caliber of the coronary arteries because of the atheromatous plaques has caused you to select coronary insufficiency as the particular type of death here rather than a myocardial infarction?

A. Well, he did not show evidence of myocardial infarction. That is not reported.

Q. Yes, but I mean your original opinion was that at the time? A. Yes.

Q. That it might have been—it was one or the other. I believe you said it probably was; is that correct, Doctor? A. Yes, that is correct.

Q. And so now you believe that it was the coronary insufficiency rather than an infarction?

A. Right.

Q. I take it, then, Doctor, that the condition of the lungs, except for the congestion which I believe you said was merely a symptom of heart failure here? A. Right.

Q. That apart from that in so far as I have read to you what they had to say about the thorax, the material things are the atheromatous deposits on the sigmoids and the diminished coronary arteries; is that correct? [92] A. Correct

Q. Was the evidence of slight hypertrophy of the left ventricle of significance to you?

A. No, only inasmuch as it would indicate that he probably has had some coronary sclerosis for a period of several months or more, but he was not supposed to have had high blood pressure, as I

(Deposition of Homer P. Rush.)

understand it, and you would have got to have some reason to make the left ventricle larger, and hypertrophy means enlargement, and the other common cause would be some mild degree of coronary insufficiency.

If it was a very serious affair, you very frequently do not get hypertrophy; you get this dilatation, so with the mild degree you read here just put that as more proof that we had coronary insufficiency. That could also go with this aortic valve lesion, would also cause hypertrophy of the left ventricle.

Q. Beginning with this, then, you believed that the hypertrophy of the left ventricle, then, was a condition which existed before the fatal heart attack?

A. Yes, I would feel that certainly it was.

Q. With respect to the atheromatous deposits on the sigmoids, is that something that existed there before the fatal heart attack?

A. Yes, in my opinion it did.

Q. Also, the diminished caliber of the coronary arteries, [93] was that condition that existed before?

A. Yes, in my opinion, it did.

Q. In your opinion, would those conditions have existed for some time?

A. Yes, I would think that they existed for some time.

Q. Assume that a man had a heart with a left ventricle lightly hypertrophied and atheromatous

(Deposition of Homer P. Rush.)

deposits on the semi-lunar valves and a diminished caliber of his coronary arteries and had no more symptoms than have been brought out here about Mr. Lyons. What is your opinion as to the condition of that man's heart as to whether there was any active heart disease there?

A. Well, I think that one would have to assume that with that amount of involvement that he had abnormal pathological findings in his heart and that one would expect that to be somewhat progressive as years went on; but, as I made the statement previously, I have seen individuals with this type of thing but much worse than this that have gone on for as long as, the one I am thinking of, 35 years, and carried on an active practice of medicine up until the last year and a half of his life, and then another one that had coronary insufficiency that I have known of for at least 25 years and still carrying on active work. The latter one, I think, is a man that is in his seventies. Now, as to that I cannot get—I don't believe that one could say that this man would [94] have a life expectancy of an individual with a perfectly normal heart. If we assume that his age was about 50, we would expect him to have a life expectancy of somewhere around 22 to 25 years, maybe this might be cut down, that he would only have a life expectancy of 21 and 22 years; but I do not believe it would have been any factor in the cause of his death at this time.

Q. Doctor, if a man with a heart such as has been described here and taking into consideration

(Deposition of Homer P. Rush.)

what you have testified to with respect to Jim Lyons and including the assumption that he had been—that he had had the pain in May, 1950, and in February on the 3rd, 4th and 5th that Mr. Kriesien has described, and assuming that a shotgun was discharged close enough to his face to have caused the powder burns that you saw and some scratching and minor laceration—now, assuming that situation, Doctor, could you say as a matter of medical certainty that the physiology of this death that you have described would not have occurred except for the discharge of the shotgun close to his face?

Mr. Kriesien: Just a moment, Doctor. I want to object to the question on the ground of and for the reason that it incorporates therein the fact not proven nor, in my opinion, being capable of proof; namely, that the accidental—that the shotgun was accidentally discharged prior to the heart [95] attack.

Mr. Beebe: I did not use the word “accidental.”

Mr. Kriesien: Or it discharged even.

Mr. Beebe: All right; will you read the question back to the doctor, and you may answer the question subject to the objection.

The Witness: Well, I can answer the question.

Mr. Beebe: You may answer the question.

A. Yes, I know the question. In my opinion, I believe that one can with certainty state that the precipitating cause in this man's death with the conditions he had was responsible for his death as

(Deposition of Homer P. Rush.)

the mechanism I have described being the most logical physiological mechanism. When I say certainty, I realize that there is nothing in biological science or in medical diagnosis that is certain, but it has the backlog of average percentage.

Q. Doctor, what would you say based on what has been given you from the autopsy as to whether there is any probability as distinguished from possibility, any probability as distinguished from possibility——

A. Will you read that?

Q. Strike that. Doctor, bearing in mind all of the factual premises that you have given us from your own knowledge and assuming what I have given you from the autopsy and what was given by Mr. Kriesien from the autopsy about the gall-bladder and including the stipulation that at the time of the autopsy [96] both of the stones were free, assuming all that, is there any reasonable medical probability that this aortic insufficiency was spontaneous and triggered by something other than the explosion of the shotgun as you have described it?

Mr. Kriesien: Just a moment. I object to that question on the ground and for the reason it incorporates therein the facts of which the doctor has knowledge and those facts not being specified.

Mr. Beebe: I have said the ones he has testified to.

Mr. Kriesien: Oh, no.

(Deposition of Homer P. Rush.)

Mr. Beebe: All right; change it to the ones that you have testified to here.

The Witness: Would you read the question?

Mr. Beebe: I said the facts that you have given us.

A. The aortic insufficiency was not caused by a gunshot wound or any other reflex. It was there previously. That is the aortic valvular insufficiency.

Q. No, no. A. That was the question.

Q. That is not the question I intended, then.

Mr. Maguire: Ask it again, or read the question.

Q. (By Mr. Beebe): Assuming the facts which you have testified to heretofore upon this deposition—

Mr. Kriesien: In what field?

Q. (By Mr. Beebe): Doctor, assuming the facts that you have [97] testified to here with respect to the apparent condition of James Lyons during the time that you were with him, what he ate, what you observed about him as you have testified here; assuming, also, Doctor, the matters that you have testified to on the morning of the death of James Lyons; assuming, also, the attack of May described by Mr. Kriesien, the pains of February 3rd, 4th and 5th, the symptoms displayed by Mr. Lyons after you found him after hearing this stridulous breathing, your feeling his chest, and assuming further the matter given you by Mr. Kriesien about the gallbladder with the further assumption that both of the gallstones were free, and assuming further the matter that I have you from

(Deposition of Homer P. Rush.)

the Mexican autopsy report concerning the autopsy findings, and assuming the condition of Mr. Lyons' face with respect to scratches and superficial lacerations and powder burns, what appeared to you to be powder burns, is there any probability as distinguished from possibility that the fatal heart attack of February 10, 1953, was precipitated by any cause other than a discharge of the shotgun close, sufficiently close to the right side of James Lyons' face to have left the powder burns, scratches and lacerations that have been referred to?

Mr. Kriesien: Just a moment.

The Witness: Will you read that whole thing?

(Last question read.)

(Discussion by counsel off the record.) [98]

Mr. Kriesien: I am objecting to that question on the grounds and for the reason it incorporates as facts upon which the doctor has to pass his opinion matters of opinion the doctor has testified to rather than facts; namely, as to whether the shotgun was discharged accidentally and prior to his suffering the heart attack.

I am just putting it in the record.

Q. (By Mr. Beebe): In other words, is there any medical probability as distinguished from possibility that there was a precipitating cause other than the discharge of the shotgun?

A. In my opinion, the probability is that the discharge of the shotgun was the precipitating cause of this man's death at this time, realizing that

(Deposition of Homer P. Rush.)

there possibly could be other causes which are highly improbable in my line of reasoning.

Q. And in your medical opinion, Doctor?

A. In my medical opinion.

Q. Doctor, take the physiology of this fatal attack which I will call it, using a layman's term, and would you describe from the beginning, beginning with the intense emotion, in language that we as laymen can understand as nearly as you can, Doctor, the physiology in sequence that you believe took place and which ultimately resulted in the death of Mr. Lyons.

A. Well, it is my feeling that due to some cause unknown [99] this man's gun slipped and was exploded when he was in the upright position, close to the right side of his face; that this produced a marked emotional upset with fear which gave reactions of increased adrenal output as well as sympathetic, some parasympathetic nerve reflex response which caused a marked tachycardia or increase in heart rate, and with those other correlating factors that go along such as change in vasomotor reaction or the change in size of blood vessels throughout his body which caused a great increased demand for blood on the part of his myocardium through the coronary vessels and which he could not get because of a poor aortic valve and narrowed coronary arteries, which in turn produced a change in the mechanism of the heartbeat resulting in a final ventricular irregularity which was probably a fibrillation which interfered more with the output of the

(Deposition of Homer P. Rush.)

blood, produced an acute heart failure with passive congestion evidenced in lungs and liver and evidenced by his clinical signs at the time, which resulted in death.

Q. Dr. Rush, what is your professional opinion, assuming the gallstones which have been mentioned located in the outlet mouth of the cystic, one of one centimeter located in the outlet mouth of the cystic, and the other smaller of three millimeters diameter in the bottom, both being free, what is your opinion as to whether that circumstance had anything to do with the death of James Lyons as a precipitating cause or otherwise? [100]

A. It would be my opinion that it was not a factor at all. In the first place, the interpretation, the outlet of the cystic——

Q. Outlet mouth.

A. Outlet mouth of the cystic would merely mean to me that it was in the duct end of the gallbladder. The cystic, I think, was merely a term they were using for gallbladder. The cystic duct itself it only about three millimeters in diameter on the average, and if you get a 10-millimeter stone, why, of course it is going to be impacted in it and you would have to have a dilated cystic duct which I think he would have mentioned if it has been dilated. It would have been normal. As you mention, it was free. I do not see how it could have been encrusted there without having some evidence that it had been encrusted if it had broken loose, and I

(Deposition of Homer P. Rush.)

think it was just the position it was probably in because of the anginal contractions that this individual went through at the time of his death, and I do not believe that it would mean more, anything more than gall stones, to have gall stones in pregnancy or the menopause of a woman who went through pregnancy that has never had a symptom in her life.

Q. Doctor, are you familiar with the magnum shotgun as to the charge of powder used there that day?

A. I am under the impression that the shell in the magnum [101] gun contains more powder than an ordinary 12-gauge shotgun does.

Q. How about the charge of pellets? Is that greater or less? A. I do not know.

Q. Doctor, anoxemia, would you tell us what that is and what part it played, if any, in the physiology of James Lyons' death?

A. Anoxemia means a decreased amount of oxygen in the blood, and it would play a part inasmuch as if you do not get an adequate amount of oxygen to the heart muscle it cannot function normally, and when you have passive congestion in the lungs you cannot get as much oxygen as you could otherwise, so a vicious circle is set up.

Mr. Beebe: That is all.

(Deposition of Homer P. Rush.)

Redirect Examination

By Mr. Kriesien:

Q. I have a few questions. I think it is immaterial, but do you know whether magnum shells were being used in that gun that day?

A. I do not know for certain. Now, it is my impression they were, but I am not certain.

Q. They can use either one. I know that because I have a magnum myself. [102]

A. No, but I am under the impression they were. That is all they had aboard, but I could not be certain.

Q. Doctor, assuming this gallstone of one centimeter in diameter lodged at the outlet of the cystic duct, causing a viscus pain, would the anginal contractions and the natural relaxation of the muscles on death allow that to drop free and be free?

A. Ordinarily, of course, we expect anginal contractions to be the reverse, but I do not believe one could dogmatically say there could be relaxation, but I would think there would be an encrusted mark on it had it been held previously.

Q. Assuming it had just lodged at the time of death at this outlet.

Mr. Maguire: Just lodged?

Mr. Kriesien: Yes, just hit the opening.

Mr. Beebe: Had not been there before?

Mr. Kriesien: Had not been there before. It

(Deposition of Homer P. Rush.)

came down the common path of the duct to the outlet.

The Witness: Well, now, if I understand that question correctly, is it that I am assuming that this one-centimeter stone went up against the cystic duct and then dropped back?

Q. That is correct.

A. Sure, I should think that could happen. I think it is highly improbable, but it certainly could.

Q. You stated in answer to a question of Mr. Beebe that the shotgun slipped from some cause unknown. Now, Doctor, isn't [103] it impossible in view of the medical case history of this individual with his attacks of February 3rd, 4th and 5th and taking nitroglycerin, that he could have been stricken with an angina pectoris attack from some cause and dropped the gun?

A. I think that is possible, but in the chain of events as I heard them and saw them I do not think it is probable. I would have expected him to have fallen with the gun, not dropped the gun.

Q. Why do you——

A. I would think he would have dropped the gun down beside him. Knowing guns like he did, it would have been reflex nature to have discarded the gun.

Q. Can such an attack be of such severe nature that he would not be able to hold a gun and would, without any conscious effort, he would just drop it?

A. I think it could be possible, but I would not expect him to do it that way without having—if this stridulous breathing came on afterwards.

(Deposition of Homer P. Rush.)

Q. I believe you said that in 50 per cent of the cases from your examination with animals that this stridulous breathing develops within a limited period of time?

A. No, I said 50 per cent of them developed ventricular fibrillation.

Q. 50 per cent of them developed ventricular fibrillation?

A. When they ligated the anterior coronary artery. [104]

Q. What about the period of time between ventricular fibrillation and your stridulous breathing?

A. Well, ventricular fibrillation could not last very long without having death.

Mr. Maguire: When you speak of "very long," what do you mean?

The Witness: I do not know that I could answer that with definite time elements. We usually think that within 20 seconds we should begin to get evidence of convulsions, when we get interference of the cerebral circulation such as we get with ventricular fibrillation or heart standstill, and by the time we get up to 30 or 40 seconds we begin to get unconsciousness with marked convulsions, and then we expect heart failure to come on after that, and I would feel that the time element was such here that these things apparently came on after the shot-gun because he was not in convulsions when I saw him after I had had a chance to walk down there, which must have taken 30 seconds or so.

Mr. Kriesien: Doctor, you have testified with

(Deposition of Homer P. Rush.)

reference to the aortic valves, the atheromatous plaques, the coronary sclerosis, and the left ventricle being hypertrophied and those heart conditions coupled with the pain, chest pains and arm radiation pains suffered by Mr. Lyons on February 3rd, 4th and 5th, and the fact that he was taking nitroglycerin, would that be indicative of the fact that the man would—carry an [105] implication of sudden death at any time?

A. Oh, I think that that would be a possibility, too. I think that that question is a little bit misleading from a medical angle inasmuch as this man went three years without any difficulty, as I understand it, and he had pain on three different occasions a week or so previous to when this happened, and if there had not been some definite undue strain to have produced this change of cardiac action at that time I do not believe that he would have died. I do not believe that it came from just standing there out in the open waiting for a dove to come over.

Q. Doctor, this, of course, is not in evidence, but assuming the fact has been established that the medical case history file of Dr. McBride's indicates that nitroglycerin is prescribed on the onset of pain and refers only to just arm radiation pain, and the further factor that there is a notation that he may need thabarine, would that be indicative to you that there was an implication of sudden death?

A. Not necessarily. It would be an indication to me that they suspected he had angina.

(Deposition of Homer P. Rush.)

Q. What is this drug, thaberine?

A. Thaberine?

(Dr. Wilson: I think that is a local California product.)

(Discussion off the record.)[106]

Mr. Kriesien: Doctor, there is one other question that I wanted to ask. Isn't it common to find a man who has died in his sleep suffering from the same heart changes as Mr. Lyons suffered from?

A. It is not common, no. It is common to have a man have a coronary thrombosis with a myocardial infarction that dies in his sleep, but I think it would be comparatively rare to have a man have angina and die in his sleep without evidence of myocardial infarction.

Mr. Kriesien: I think that is all.

Doctor, you, of course, have the privilege of reading and signing this deposition. I presume you will want to read it? A. Yes.

(Deposition concluded.)

/s/ HOMER P. RUSH. [107]

Certificate

State of Oregon,
County of Multnomah—ss.

I, the undersigned, Gordon R. Griffiths, a Notary Public for Oregon and an Official Reporter of the above-entitled Court, do hereby certify that on the 7th day of January, 1955, before me as such Notary, at Suite 601, 919 Taylor Street Building, Portland, Oregon, personally appeared, at the time mentioned in the caption and stipulation set out on Pages 1, 2 and 3 of the foregoing transcript, Homer P. Rush, M.D., a witness produced in behalf of Defendant.

Messrs. Robert F. Maguire and Howard K. Beebe, of Attorneys for Plaintiff, appearing in her behalf; and Messrs. Ray Mize and R. E. Kriesien, of Attorneys for Defendants, appearing in their behalf; and the said witness being by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and being carefully examined, in answer to all interrogatories and cross-interrogatories propounded by the attorneys for the respective parties, testified as in the foregoing annexed deposition, Pages numbered 1 to 107, both inclusive, set forth.

I further certify that all interrogatories and cross-interrogatories propounded to said witness, together with the answer of said witness thereto and all objections and motions taken or made, and other proceedings occurring upon the taking of said depo-

siton, were then and there taken down by me [108] in shorthand and thereafter reduced to typewriting under my direction; and that said deposition, when fully transcribed, was submitted to the witness for examination and reading to or by him, and opportunity to the witness to make any changes in form or substance, and that thereafter said witness subscribed his name to said deposition before me as as such Notary; and that said deposition has been retained by me for the purpose of sealing up and directing it to the Clerk of the above-entitled Court, as required by law.

I further certify that I am not a relative or employe or attorney or counsel for any of the parties, or a relative or employe of such attorney or counsel, or financially interested in the action.

In Witness Whereof, I have hereunto set my hand and notarial seal this 21st day of November, 1955.

[Seal] /s/ GORDON R. GRIFFITHS,
Notary Public for Oregon.

My Commission Expires: March 22, 1957.

[Endorsed]: Filed November 21, 1955. [109]

No. 15412-15413

United States
COURT OF APPEALS
for the Ninth Circuit

UNDERWRITERS AT LLOYD'S, LONDON,
ENGLAND,

Appellant,

vs.

JANE S. LYONS,

Appellee.

GLEN FALLS INDEMNITY CO., a Corporation,
Appellant,

vs.

JANE S. LYONS,

Appellee.

BRIEF FOR APPELLANTS

*Upon Appeal from the United States District Court
for the District of Oregon.*

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FILED

APR 20 1957

PAUL P. O'BRIEN, CLERK



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No. 15412-15413

United States
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UNDERWRITERS AT LLOYD'S, LONDON,
ENGLAND,

Appellant,

vs.

JANE S. LYONS,

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GLEN FALLS INDEMNITY CO., a Corporation,
Appellant,

vs.

JANE S. LYONS,

Appellee.

BRIEF FOR APPELLANTS

*Upon Appeal from the United States District Court
for the District of Oregon.*

BASIS OF JURISDICTION

These actions originated in the United States District Court for the District of Oregon by Appellee filing complaints wherein she sought to recover on two accident policies issued by the Appellant Underwriters at Lloyd's,

London, England in the amounts of Seventy-five Thousand Dollars (\$75,000) and Twenty-five Thousand Dollars (\$25,000) respectively, and one accident policy issued by the Appellant Glens Falls Indemnity Co., a Corporation, in the amount of Five Thousand Dollars (\$5,000), wherein the named insured was James Alexander Lyons and Appellee the sole beneficiary.

The jurisdiction of that court was based on diversity of citizenship, under the provisions of Title 28, U. S. Code, Judiciary and Judicial Procedure, Section 1331, in that Appellee was a citizen and resident of the State of Oregon, the Appellant Underwriters at Lloyd's, London, England was an association of individuals, none of them being citizens or residents of the State of Oregon, and the Appellant Glens Falls Indemnity Co., was a corporation organized and existing under and by virtue of the laws of the State of New York (R. 3).

Following pre-trial conferences the District Court entered a Pre-Trial Order which set out the admitted facts (R. 10-12; R. 8-11) and defined the specific issues to be tried (R. 15-16; R. 13-14). The cases were consolidated and tried to the court without a jury.

The trial court rendered its opinion (R. 19-22; R. 17-20) made and entered its findings of fact and conclusions of law (R. 23-26; R. 21-25) and on November 13, 1956, judgments in favor of the Appellee were filed (R. 27-28; R. 25-26).

On December 11, 1956, notices of appeal, together with undertakings for costs on appeal, were filed with the District Court Clerk's office (R. 29-30; R. 27-28).

This court has jurisdiction of the appeals under the provisions of Section 1291 of Title 28, U. S. Code, Judiciary and Judicial Procedure, and the same were consolidated for printing and oral argument purposes (R. 37-38; R. 33-34).

STATEMENT OF THE CASE

THE ADMITTED FACTS

The pertinent facts determined to be undisputed in the Pre-Trial Order and set forth in the uncontroverted findings of fact of the lower court may be summarized as follows:

That on the 10th day of February, 1953, there was in full force and effect Appellant Underwriters at Lloyd's, London, England's accident policy No. 0-OMC-1740 in the principal sum of Seventy-Five Thousand Dollars (\$75,000) and No. 0-5058-1 in the principal sum of Twenty-five Thousand Dollars (\$25,000) wherein James Alexander Lyons was the named insured and the Appellee the designated beneficiary, payable in the event James Alexander Lyons:

(a) Sustained bodily injury caused by accidental, violent, external and visible means, which shall solely and independently of any other cause within three calendar months from the date of the accident causing such injury occasion his death; and

(b) That the assured's death was not directly or indirectly caused or contributed to by disease or natural causes.

(R. 10-11; 23-24) and Appellant Glens Falls Indemnity Co. accident policy No. 22148 in the principal sum of Five Thousand Dollars (\$5,000) wherein James Alexander Lyons was the named insured and Appellee the designated beneficiary, payable in the event James Alexander Lyons:

(a) Sustained a loss resulting directly and independently of all other causes from bodily injuries sustained and effected solely through accidental means.

(b) That the policy shall not cover death caused directly or indirectly, wholly or partly, by bodily or mental infirmity or by any other kind of disease (R. 9, 21-22).

Additional pertinent facts determined to be undisputed in the Pre-Trial Order and not set forth in the findings of fact of the lower court may be summarized as follows:

That on February 10, 1953, James Alexander Lyons died in the country called Los Llanos, Southern Territory of Lower California, Mexico, and as a result thereof an inquest was conducted, an autopsy performed, and a death certificate (Ex. 44), the English translation thereof is set forth in Appendix A, which was duly recorded, certifying the cause of death as:

“That the cause of death was owed to an aortical insufficiency that probably provoked the sudden fatigue of the heart, having found moreover atheromatous deposits of the coronary arteries.” (R. 11-12)¹

Appellee filed proof of death of James Alexander Lyons with Appellants incorporating copies of the foregoing official document as well as two affidavits of Dr. Homer P. Rush certifying as to the cause of death (R. 11-12)¹. The proof of death with attachments (Ex. 7) omitting the documents in the Mexican language, but incorporating the English translation thereof, is set forth in Appendix B.

Based on the proofs of death the Appellants rejected Appellee's claim and these actions were instituted.

THE ISSUES

The issue for determination in the lower court was whether the death of the insured James Alexander Lyons was one within the policy coverage and without the policy exclusions.

THE FACTS

The Insured

He was an outdoor man, used to considerable exertion, both mental and physical (R. 54-60). He kept his physical complaints to himself (R. 140). He was an expert hunter, familiar with firearms, advocating guns could be handled in safety (R. 60, 156, 228-229).

The Insured's Medical History

The evidence established that:

On May 12, 1950, Mr. Lyons, while walking across a dock was seized with chest pain which radiated down

¹Reference is made to Transcript of Record in case No. 15412 for the sake of brevity.

his arms to the extent he could not hold a telephone. He was examined by Dr. McKeown at Coos Bay, Oregon, who subjected him to the usual cardiac tests and diagnosed the pain as being due to intercostal neuritis and anxiety tension (R. 196-199). However, Dr. McKeown advised Dr. William McBride of Palm Springs, California, Mr. Lyons had to be slowed down (Ex. 18) as he was fearful that something would happen to endanger his life (R. 204-205).

On February 3, 1953, Mr. Lyons returned to Palm Springs, California, from an extensive business trip (R. 56-58) and during the night had an attack of pain in his chest (R. 135). On February 4, 1953, he consulted Dr. McBride, complaining of constriction in the chest with radiation down the arms which occurred on February 3 and 4, 1953. Dr. McBride performed the usual cardiac tests, which were within normal limits, and without objective symptoms of heart disease (Ex. 2, p. 4-5). Dr. McBride diagnosed the condition as cardiac fatigue pain due to emotional stress from the business trip (Ex. 2, p. 4). Dr. McBride's office notes reveal:

"2-4-53: Has had attack of chest pains yesterday and today. Constriction in chest and radiation down arms. Flourosopic and EKG not diagnostic. Sed rate (illegible word) also WBC and uric acid. RX nitroglycerine 1/200 on onset of pain. May need *thaverine*.

"2-5-53: Pain some imp. advised to go fishing."
(Ex. 18)

Dr. McBride advised Mr. Lyons not to do any "excessive work, such as tramping around fields or any

heavy lifting" (Ex. 2, p. 4), as he was interested in Mr. Lyons getting some rest as "this underarm pain was a brand new symptom, never manifested it before." (Ex. 2, p. 8).

The Insured's Death

On January 10, 1953, the insured, Drs. Rush and Chamberlain, and Mr. Lyon's airplane pilot, Mr. Parrick, arose about 5:00 o'clock A. M., had breakfast and were met by Senor Ruiz and his son, who were taking them dove hunting (R. 154-155). They arrived at the hunting area about 7:00 o'clock A. M. and the doves commenced flying about 7:30 A. M. (R. 180). The country was of a semi-rough, sandy nature with sand dunes, sage brush and shemise (R. 155). The party walked around the countryside over a distance of one-half mile, up and down sand dunes 80 to 100 feet in height. The walking was rather difficult (R. 156-157).

The party separated and Mr. Lyons and Dr. Rush were spaced some 60 yards apart where Dr. Rush could not see the insured because of the brush (R. 182-183). While the insured and Dr. Rush were separated, the latter heard Mr. Lyons shoot at intervals, saw doves fall and then there were two shots in rapid succession, about 2 to 3 seconds apart (R. 419-420). Within a period of 5 to not longer than 10 to 12 seconds, Dr. Rush heard stertorous breathing and believing that Mr. Lyons might be in some difficulty started in his direction and found him, within a period of 30 seconds, in an unconscious, cyanotic and pulseless condition (R. 422-423). Mr. Lyons had moved a distance of some 30 yards (R. 181).

from the point where Dr. Rush left him and was found lying face down with the upper half of his body under a mesquite bush with the shotgun under him, the muzzle protruding upward diagonally from a point just below his left shoulder approximately 1 foot, and the butt of the gun protruding at an angle from a point past his right hip (R. 185). Dr. Rush noticed blood on the side of the insured's face, called for help, which arrived within a period of 20 to 40 seconds, Mr. Lyons was rolled over and away from the bush within a matter of 5 seconds, pulmonary edema developed within a period of 5 seconds and he expired within "just a few moments" after Dr. Rush's arrival (R. 423-426), notwithstanding the administration of artificial respiration (R. 188).

Dr. Rush examined the insured's wounds noting scratches and erosion on the right side of the face, neck and temple, together with some powder burns and he felt what he interpreted to be one pellet under the skin (R. 188-189). The injuries were very slight and of a superficial nature (App. B, p. 62, 65; R. 304, 478-481. At that time Dr. Rush was of the opinion the death of Mr. Lyons was not the result of the superficial injuries, but a heart death from the way Mr. Lyons acted clinically (R. 428-429).

The immediate area was examined and no evidence of a gun blast on the ground or in the brush was found (R. 190). The gun involved was a Winchester 12-gauge magnum pump shotgun (Ex. 1) which was in perfect working condition, could not be discharged with the safety on or off by striking the gun on a concrete floor

(R. 70-71) and a pull of $4\frac{1}{4}$ to 5 pounds was required to trip the trigger to discharge the gun (R. 74).

The Mexican authorities investigated the occurrence, transported the insured's body by car to San Jose del Cabo, a distance of approximately 50 miles, and that evening Dr. Serrano and Dr. Rodriguez performed an autopsy. The following day an inquest was held (App. A).

The findings on the post mortem examination which were considered significant by the medical experts testifying at the trial, as retranslated by Dr. Jose J. Christen, were:

"Blood crusts in the right and left side of the face. They were more abundant in the first mentioned side. When these were lifted powder dust was found to be incrustrated in the palpebral, temporal regions and on the ear lobe of the right side. Skin scratches of founded and linear shape were present in irregular distribution in the rest of the fact. There is a circular shaped orifice with inverted margins of an approximate diameter of one millimeter in the frontal region, right half, at the site of the hair line. Skin scratches were found on the neck which became evident when the blood crusts on them were lifted; the limits and distribution of these scratches were irregular, but they more precise than the ones on the face; they vary from half to one millimeter in length approximately. Scratches on the external aspect of the arm, lower third, elbow, external and posterior aspects of forearm and dorsal aspect of the right hand. Skull, shape and volume were normal, when the scalp was detached it was noticed that the orifice present in the right frontal region did not reach the bone in depth and that its contours were lost in the fat tissue. * * *

"The right lung was found to be free. Both lungs were found to be congested. On cut section black liquid blood seeped out. The superior and inferior left lung lobes were fused together. The pericardium was found to be thickened and it had strong adhesions to the diaphragm. The heart was surrounded by a dense coat of fat tissue. The left ventricle was slightly hypertrofied, and the semicircular valves of the aorta were thickened and hardened with atheromatous deposits, Mitral valve was slightly dilated. The coronary arteries were dissected and they were found to have a diminishment in their calibre due to the presence of atheromatous plaques. Abdomen. The liver was very enlarged in weight and volume. It was of dark red color that on cut section presented slight resistance. Gall bladder was full dark green bile in about 40 cc. It also contained two gallstones, the first one of 1cm. of diameter approximately placed at the cystic duct outlet and a second one which was smaller of 3mm. of diameter in the fundus. The rest of the organs of the abdomen were without pathological alterations.

"Conclusions. It is considered as the direct cause of death 'Aortic insufficiency that probably brought about the acute cardiac failure.' Secondary lesions related to the cause of death Coronary atheromatous plaques (coronary insufficiency), pulmonary congestion and hydatomegalia. Lesions that are independent from the cause of death—Scatches on the face and neck. Powder dust incrustations. Biliary lithiasis. * * *" (Ex. 15)

Subsequent ex-party examination of the autopsy surgeons (Ex. 14) revealed: there was no evidence of antemortem clotting or embolus in the pulmonary artery; the semicircular or semilunar valves were thickened and hardened; there was hypertrophy of the left ventricle; the left and right coronaries were dissected and atheromatic plaques were found; that the doctors were unable

to state the diminishment in the diameter of the coronary arteries; and two gallstones, one of one centimeter in diameter was lodged in the union of the cystic canal with a common bile duct and a smaller one of 3 millimeters in diameter in the fungus of the gall bladder, both were free (R. 106-108). A subsequent post mortem examination was conducted by Dr. William Lehman, a qualified pathologist, who found nothing medically important as the involved viscera was not with the body (R. 116).

THE COURT'S FINDINGS

After six days of trial consisting primarily of medical testimony, the court rendered its opinion (R. 19-22) and thereafter entered the following controverted findings of fact:

"V.

"On or about the 10th day of February, 1953, the said James Alexander Lyons sustained bodily injury caused by accidental, violent, external and visible means which solely and independently of any other cause occasioned his death within three calendar months from the date of the accident which caused said injury. Said injury was caused by the accidental discharge of a shotgun. (R. 24)

"VI.

"Said James Alexander Lyons was a vigorous, robust man of normal health for his age and was not suffering from disease. His said death was not caused or contributed to directly or indirectly by disease or natural causes." (R. 25)

QUESTION PRESENTED

Whether there is any competent, satisfactory evidence to support the court's findings of fact numbered V and VI (*supra*)?

STATEMENT OF POINTS TO BE URGED

1. The court erred in failing to enter judgment for Appellants.

2. The court erred in finding that the assured, James Alexander Lyons, on or about February 10, 1953, sustained bodily injury caused by accidental, violent, external and visible means which solely and independently of any other cause occasioned his death within three calendar months from said date.

3. The court erred in finding that said assured, James Alexander Lyons, suffered an injury, on or about February 10, 1953, from an accidental discharge of a shotgun which caused the assured's, James Alexander Lyons', death.

4. The court erred in finding that said assured, James Alexander Lyons, was a robust man for his age, was not suffering from disease, and that his death was not caused or contributed to directly or indirectly from disease or natural causes.

5. The court erred in considering speculative, incompetent and inadmissible evidence in finding for Appellee.

6. The court erred in entering a judgment in favor of Appellee, Jane S. Lyons.

7. The court erred in failing to find that the Appellee failed to sustain her burden of proof by any competent, substantial evidence that the discharge of the shotgun preceded the onset of the fatal heart attack which caused the assured's, James Alexander Lyons', death.

8. That the court erred in failing to find that the Appellee failed to sustain her burden of proof by any competent, substantial evidence that any bodily injury which may have been sustained by the assured, James Alexander Lyons, solely and independently of all other causes resulted in the assured's, James Alexander Lyons', death.

9. That the court erred in failing to find that the Appellee failed to sustain her burden of proof by any competent, substantial evidence that the assured's, James Alexander Lyons', death was not caused or contributed to by a pre-existing heart disease.

SUMMARY OF ARGUMENT

There is no competent substantial evidence in the record to sustain the court's findings V and VI, supra, and those findings are based on evidence which was speculative, inadmissible and "opinions" reached by a process of basing inferences on inferences.

ARGUMENT

The court erred in entering its findings of fact numbers V and VI, as there is no competent substantial evidence to support the contested findings.

In Oregon, the Appellee had the burden of proving the death of the insured resulted from accidental bodily injuries which solely and independently of any other cause occasioned his death and that the insured's death was not directly or indirectly caused or contributed to by disease or natural causes. *Seater v. Penn Mutual Life Insurance Company*, 176 Or. 542, 156 P. 2d 386, 159 P. 2d 826; *Hutchison v. Aetna Life Insurance Company*, 182 Or. 639, 189 P. 2d 586.

The autopsy report, as retranslated (Ex. 15), and the official death certificate (Ex. 44) constituted prima facie evidence of the cause of death. *State v. McDonald*, 55 Or. 419, 103 P. 512, 104 P. 967, 106 P. 444; *Seater v. Penn Mutual Life Insurance Company, supra*. The only known fact, and upon which all medical experts were in agreement, is that the insured died of a heart attack.

This appeal, of necessity, is limited to the question of the sufficiency of the evidence to support the court's contested findings which involve the issues of: (A) Whether there is any competent substantial evidence an accidental discharge of the shotgun preceded and precipitated the insured's fatal heart attack, (B) whether there is any competent substantial evidence an anguish and pain reflex from the discharge of the shotgun solely and independently of all other causes resulted in the in-

sured's death, and (C) whether there is any competent substantial evidence the death of the insured was not caused or contributed to by disease.

A. There is no competent substantial evidence an accidental discharge of the shotgun preceded and precipitated the insured's fatal heart attack.

While the trial of these cases consumed six days of complex medical evidence, the only testimony on this primary and all essential fact consisted of the following questions and answers of Dr. Francis Chamberlain and Dr. Homer P. Rush.

The "Opinion" of Dr. Chamberlain:

"Q. And finally, I note further that on—now, Doctor, I will ask you to state whether or not—what in your opinion from your personal observation of the history given of Mr. Lyons' health, the medical records; the testimony of Dr. Rush as to what he saw, what in your opinion was the cause of his death, Mr. Lyons' death? * * *

The Witness: I have examined all the facts and it is my belief from the examination of these facts that this man died as a result of the gunshot wound to the face. * * *

Q. (By Mr. Maguire): Why did you say that that was the cause of death, what did it do, in your opinion?

A. I think that the gunshot caused Mr. Lyons suddenly to have pain. He was startled. The usual reaction is one of anguish, as well and that these things then create the clinical condition which we refer to as 'shock.' I think that—so that I think they produce shock at the same time I feel that the patient—that the gunshot wound was the direct

cause of his heart developing an unusual abnormal rhythm. * * *

The Court: Well, I am going to deny the motion. Now, Doctor, this man Mr. Lyons was an experienced woodsman and hunter as has been testified to here. How do you account for the fact that the mere discharge of a shotgun would so disturb the function of his heart and rhythm that it would cause his death unless there was some pre-existing condition there which was present at the time of the firing of the shot?

The Witness: Well a man like—such as this—who was an experienced hunter who had a gun go off in his face, this is emotionally in my opinion, apt to be much more shocking than some greenhorn. This man had prided himself and he had (205) so told me. I wasn't asked, but I should be glad to mention it, in the course of the earlier discussion I mentioned that he and I spent a good deal of time talking about children and having them brought up by women, and that is his main thought in this respect was to see that his only son was taught to be an experienced hunter, and that in spite of various objections from the feminine side, that he had been able to convince everybody that this boy should be taught to be a hunter, that this was a man's sport, that it could be done in complete safety. I think that probably means that his foundation of his consciousness of what was right or wrong, good or bad, perhaps was such, I think, that to him would be a greater shock than I, as a once-in-a-while hunter. I would think that that was one factor in contributing. I also felt from the observation I made of his face, certainly he received—there was evidence on his face, of a good deal of trauma, I assume from the gun, that the man must have had a good deal of pain. Now, hearts, though such an instrument which is normal can develop abnormal rhythms it is true, they are more apt to develop abnormal rhythms in the heart as a result of some underlying

disease. My feeling that the man had an abnormal rhythm is based on two or three unusual facts. One of these is that Dr. Rush, who was an experienced observer, who was this man, has told the Court that he felt a purring on this man's chest; a purring on a man's chest is a very unusual finding to observe when a man is unconscious and (206) the usual cause of the purring sensation on a man's chest, when he is entirely unconscious, providing the purring sensation did not pre-exist, is an unusual type of heart rhythm which we refer to as ventricular fibrillation or ventricular flutter, that is the purring sensation, then I think, as I have stated earlier, as I mentioned earlier, this was no ordinary type of death, because that man—I should say that usually when a heart stops suddenly, and I have seen it happen many, many times in my work—when a heart stops suddenly there is a short period of time, a few seconds, and then a patient develops the stertorous snoring type of breathing. The stertorous snoring type of breathing usually lasts a period of a half minute or less. This stertorous type of breathing in this man continued for a long time. This continued, Dr. Rush described, for a good many minutes. I have another reason—may I go on? I have another reason for believing that this was a rhythm of this type, and that is that this man who previously demonstrated no signs of heart failure, even though we observed him and were with him constantly, that this man showed something else which was unusual, and that was that Dr. Rush described two or three minutes after he had watched him with this stertorous type of breathing, the foam and then pink-tinged foam appeared at the mouth, and even the Mexican autopsy report stated the man had signs of congestion in his lungs, and congestion in (207) his liver.

“Now, a man whose heart suddenly stops does not develop manifestations of congestive heart failure in a half minute. It takes at least a few minutes to develop. Furthermore, there was evidence brought

out by Dr. Lehman this morning that there was in-duration, swelling around the lacerations on his face, which don't occur momentarily, but take a matter of a few minutes to develop. For all those reasons then, I believe that this was not an ordinary death. That the gunshot touched off some unusual heart rhythm, that is the ventricular fibrillation, or perhaps a combination of these two or another rhythm which I have observed, and which may occur is what we call the ventricular tachicardia where the heart beats very rapidly at the rate of about 300 a minute, much too fast to have sufficient filling to be able to drive blood to the brain sufficient to let a patient maintain consciousness or to nourish the brain and yet sufficient to produce that purring sensation and allow life to be maintained for a longer time than usual, so for all these reasons I think that that suggested an unusual mechanism must be called in which is the only explanation that I can make in this particular case." (R. 226-231)

The "Opinion" of Dr. Rush:

"Q. (By Mr. Beebe): Now, Doctor, in your opinion, is it possible that a shotgun blast close to the face, which was sufficient to cause powder burns and scratches and wounds such as you described on your examination, is sufficient to bring about a state of medical shock such as you have described in giving your reasons for your prior answer? (363) * * *

The Witness: If I understood the question correctly, do I believe that the shotgun explosion could cause the shock, and in my opinion, it could cause it.

Q. (By Mr. Beebe): The corresponding medical shock, yes.

A. That is my opinion, that it could, yes, sir." (R. 377-378)

Drs. Rush and Chamberlain assumed as the foundation of their "opinions" the very fact in issue—that the

shotgun was discharged prior to the onset of the insured's fatal heart attack (R. 311-2, 372, 481, 486-7).

Drs. Rush and Chamberlain assumed as one of the necessary premises of their "conclusions" that the reported diminishment of the caliber of the coronary arteries of the insured from atheromatous deposits (Ex. 15) did not precipitate the fatal heart attack by engaging in speculation and conjecture as to the extent of the involvement of the coronary arteries (R. 266, 271, 312, 445, 487-9), however admitting it was a possibility and could not be ruled out in this case (R. 485-7).

Dr. Chamberlain assumed the occurrence would have been more emotionally shocking to the insured than others based not on evidence in the record nor admissible—the insured's statements concerning family differences of opinion over the safety of hunting (R. 228-9) and by resorting to speculation and conjecture assumed the insured suffered an anguish reflex, or emotional trauma, as a result of the discharge of the shotgun. Dr. Chamberlain on cross-examination, testified:

"Q. Could emotional factors precipitate coronary insufficiency?

A. Usually an emotional factor will not precipitate it nearly as readily as physical exertion will. As a matter of fact, at the university we used a cap pistol in the course of our taking an electrocardiogram, at the University of California electrocardiology department when I was there, and in the course of taking the examination we shot a cap pistol off and said, 'Oh, my,' as though the machine had broken, to see if we could produce electrocardiographic changes, and the chance of producing the changes like that, from some sort of a fright, was very exceptional that we could; * * *

Q. But it is medically possible for an emotional factor such as this to precipitate a cause of acute coronary insufficiency?

A. It's possible, but I don't recall an instance off-hand of any patient who had his coronary pain during the course of excitement, rather than exercise, unless there is something else physically which intervenes, such as hardening of the arteries or an arthritic infirmity, or something of the sort. The first thing that happens the patient will tell you is pain that comes on on the peak of physical exertion." (R. 273-275)

Q. (By Mr. Kriesien): Is there adequate information, for you, Doctor, to be able to state whether the pain suffered as a result of the—of that accident would be greater than that suffered from the lacerations of the face?

A. I have no way of knowing, but he must have been burned, for one thing, which is a painful affair. The severity of the trauma isn't necessarily closely related to the severity of the pain. I think that it's impossible to ask a person to say if this hurt, other than I know that I felt that the emotional trauma associated with the gunshot wound was an important factor, because this man's belief that his boy, who meant more to him than anything in his life, I should say hunting life, even though the women say it is dangerous stuff, and you shouldn't do it, I think is a strong emotional factor here, but I can't say that—oh, because of error, I don't think anybody can say with any certainty, whether there would be any shock associated with it. The degree of shock roughly parallels the degree of trauma, but the association isn't an expectant one." (R. 302)

Q. All right. What about this anguish reaction you were speaking of, could that alone have resulted in death?

A. Anguish alone can produce a chain of events which can result in death. The patient—I mean it isn't very common, but there is plenty of it on the

record, scattered cases here and there, where a patient, from an emotional reaction of joy or anguish suddenly dies, in which case the mechanism is usually one considered to be of some abnormal rhythm (286) developing in the heart. Again, there is a lot of guesswork as to this, because you don't have all the gadgets that shows what the pressure is doing, or what the heart is doing, because sudden deaths are unexpected." (R. 304)

If we remove these incompetent "facts" which Dr. Chamberlain assumed and considered to be of importance in reaching his "conclusion," his remaining testimony does not support a conclusion an accidental discharge of the shotgun preceded and precipitated the fatal heart attack as superficial injuries such as sustained by the insured do not commonly result in death (R. 305, 479).

Aside from the speculation indulged in by Dr. Chamberlain's assuming an anguish or emotional reflex, as evidenced by the foregoing testimony, the "opinion" is of no probative value as it was based partly on statements of the insured to the doctor which could not have been admitted in evidence. In *Henderson v. U. P. R. R. Co.*, 189 Or. 145, 219 P. 2d 170, it was held that a medical expert's opinion was of no probative value for the reason it was based, partly at least, on the history given by the plaintiff. The court stated at page 165:

"That his testimony did not have reference solely to the facts assumed in the hypothetical question addressed to him but as well to information otherwise obtained, appears in several places in the record. * * *

"Dr. Mintz' opinion that the blow caused the osteomyelitis was, according to his own statement, based upon the history given him by the plaintiff. That opinion and its background cannot be separated from his judgment as to the connection between the blow and the gangrene. He himself combined the two in the explanation he gave when asked whether damage could be done to the artery without damaging the bone and in his sweeping statement that the blow 'aggravated anything he had there before.' * * *

"9. But, putting that to one side, his categorical statement on cross-examination that there was a connection between the blow and the gangrene is without probative value because it was based, partly at least, on the history given him by the plaintiff.

"10. It is the rule in this state, as elsewhere, that 'an expert, though thoroughly qualified as a witness, cannot be permitted to give an opinion upon facts known to him, and not communicated to the jury'; that 'no allegation can be proved by the *ipse dixit* opinion of any expert unless the facts or phenomena upon which he bases his opinion are disclosed either by his own testimony or that of other witnesses.' *State v. Willson*, 116 Or 615, 619, 620, 241 P. 843; *State v. Simonis*, 39 Or. 111, 116, 65 P. 595. See, also, *Lippold v. Kidd*, 126 Or. 160, 164, 269 P. 210, 59 A.L.R. 875; Rogers, op. cit., 106, § 52; Wigmore, op. cit., 792-3, § 672, 799, § 680. In *Lippold v. Kidd* we said:

" 'The expert witness is granted the privilege of expressing to the jury an opinion because his superior training enables him to arrive at a conclusion which is more likely to be sound than that of the average juror. But all opinions are based upon facts; generally the recipient of an opinion is at a loss to know what use he may advisedly make of an expert's opinion unless he also knows what facts the expert took for granted when he formulated his conclusion.'

"In the present case Dr. Mintz relied on facts which not only were not in evidence but which could not have been admitted in evidence—the *ex parte* statements of the plaintiff made to the witness, not as communications between doctor and patient but between a party to a lawsuit and a doctor examining him for the purpose of qualifying himself to testify as an expert on the former's behalf. *Watrous v. Salem Brewery Ass'n.*, 151 Or. 294, 303, 49 P. 2d 375; *Wise v. State Ind. Acc. Comm.*, 148 Or. 461, 35 P 2d 242; *Reid v. Yellow Cab Co.*, 131 Or. 27, 279 P. 635, 67 A.L.R. 1. In a similar case the court said:

"* * * The opinion of the doctor is indivisible; it must be accepted or rejected as a whole; there is nothing to indicate how much it rests on the declarations, and how much on personal observation. The jury should not have been allowed to guess what it would have been in the absence of the declarations, or any part of them, and to estimate its value accordingly.' *Delaware, L. & W. R. Co. v. Roalefs*, 70 F. 21, 24.

"Counsel for the defendant moved to strike Dr. Mintz' testimony concerning aggravation of arteriosclerosis, after the basis of his testimony had been disclosed. The court denied the motion. We think that it should have been allowed."

The propriety of eliminating the incompetent evidence to determine if the finding is founded upon speculation and conjecture as enunciated in *Bridenstine v. Gerlinger Motor Car Co.*, 86 Or 411, 168 P. 73, 972, wherein the court stated at page 426:

"It is strenuously insisted that there was enough competent evidence to carry the question of Hargroves' agency to the jury. Verdicts must be supported by evidence; and they cannot stand when founded only upon supposition, speculation and

conjecture. As we read the record, the most that can be said for the verdict, if the incompetent evidence is first eliminated and if it is then assumed that the verdict rests upon a finding that Hargroves was an agent of the company, is that it was founded upon speculation and conjecture: *Spain v. Oregon-Washington R. & N. Co.*, 78 Or. 355, 369 (153 P. 470); *Parmelee v. Chicago M. & St. P. Ry. Co.*, 92 Wash. 185 (158 P. 977)."

Dr. Chamberlain did not testify that in all "probability" a discharge of the shotgun preceded and precipitated the fatal heart attack. In his answers, *supra*, he used the terminology "I think," "it is my belief," and concluded:

"* * * so for all these reasons I think that that suggested an unusual mechanism must be called in, which is the only explanation that I can make in this particular case." (R. 226-231)

On cross-examination he testified with relation to the precipitating cause of the fatal heart attack:

"* * * I think a combination of all these is quite sensible as an explanation." (R. 298)

"* * * but I think the chain reaction which was started off by this is a very sensible one." (R. 299)

Dr. Rush in relating his "opinion" as to the chain of events used the terminology "I believe," "I think," "I felt," and concluded:

"So I then must assume that it was some strong emotional factor that initiated it, because the other factors were not there." (R. 375-77)

On cross-examination, concerning the chain of events, he testified:

"* * * it would seem to me that we would have to

explain it on the basis of some outside emotional or outside cause for an emotional upset of some kind. I don't know of any other way to explain it." (R. 410)

It is elementary law that medical testimony in the terms of mere "possibility" will not lift the case out of the area of conjecture and speculation and fails to constitute substantial evidence for any purpose. In *Devine v. Southern Pacific Co.*, 207 Or. 261, 295 P. 2d 201, the court stated:

"2, 3. We have often stated that an issue of fact may be submitted to a jury only when the proof shows reasonable certainty as opposed to 'a finding dependent upon conjecture and speculation,' and that mere possibility, alone, of a causal relation between an injury and a physical result are insufficient to lift the case out of the area of conjecture and speculation. *Henderson v. U. P. R. R. Co.*, 189 Or. 145, 160, 219 P. 2d 170.

"It must be admitted that the answer to this question lies solely in the realm of medical science. In a case such as this, where 'the physical processes terminating in the death are obscure and abstruse,' the triers of fact, without the aid of expert testimony, can only speculate upon the effect of the trauma as resulting in the disease causing death. Any facts that could be shown by the plaintiff, apart from the medical testimony, would not warrant a conclusion that the cancer which resulted in death was caused by the blow from the falling cattle car door." (p. 265)

"4. While the doctor's explanation of his answer to the hypothetical question would be insufficient to establish a causal relation, because of possibility only appears, nevertheless, without objection, he stated that in his opinion the injury received caused the diseased condition which resulted in Devine's

death, and we are of the opinion that the positive statement of the fact of causation raises the quality of the evidence from possibility to probability. Note to 135 ALR 541, and cases cited therein.

"The defendant, however, points out that the doctor's positive statement, like his answer to the hypothetical question, is improper and should have been stricken on defendant's motion, because both were based upon information not contained in the record.

"5, 6. An expert must state his opinion upon facts presented in the record, for the reason that a jury must determine the weight to be given the opinion, and, without knowledge of what facts the expert accepts as true, an evaluation of his opinion is impossible. *Henderson v. U. P. R. R. Co.*, *supra*; *Lippold v. Kidd*, 126 Or. 160, 269 P. 210, 59 ALR 875.

"7. Nevertheless, the defendant cannot now complain, because it specifically waived its objection to the hypothetical question." (p. 272-3)

In *Henderson v. U. P. R. R. Co.*, *supra*, the court stated at page 160:

"* * * The question here, however, is not one of the admissibility, but of the sufficiency, of evidence; and medical testimony in terms of mere possibility will not lift the case out of the area of uncertainty if the other evidence leaves the question speculative. * * *"

A practically similar answer to those of Drs. Chamberlain and Rush developed in the case of *Hutchison v. Aetna Life Insurance Co.*, *supra*, where an expert witness, Dr. Smith, at the conclusion of a hypothetical question was asked:

" 'Assuming those to be facts, Doctor, would you say that the accident was the probable cause of his

death?' to which he answered, 'Well, from a medical and surgical standpoint, it strikes me that this whole thing which was the active cause of this was an accident which the man had.' * * *" (p. 645)

"Without further discussing the character of Dr. Smith's answer, we agree with plaintiff's counsel that the answer was 'indefinite,' 'quite worthless,' and that it 'does not mean anything.' His testimony, in this respect, was wholly devoid of probative value or force." (p. 649)

In *Wintersteen v. Semler*, 197 Or. 601, 250 P. 2d 420, 255 P. 2d 138, a lengthy malpractice case wherein plaintiff claimed a lung abscess to be the result of defendant's negligence, the court made the following pertinent remarks which Appellants feel to be applicable to this case:

"So, in the instant case the only known or proved fact is that plaintiff had an abscess, and, to arrive at the conclusion that such abscess was caused by the improper position of plaintiff on her back, Doctor Tuhy had to indulge in the several inferences hereinbefore set out. It is well known that a person may suffer an abscess from various causes, and to say that plaintiff's abscess was caused in the manner delineated by Doctor Tuhy would be pure conjecture and highly speculative." (p. 614)

"To establish proximate cause, plaintiff relies entirely upon the testimony of Dr. John E. Tuhy * * *. It is manifest from the record that if Dr. Tuhy's testimony is insufficient as a matter of law to warrant the submission of the question of proximate cause to the jury, plaintiff's cause of action against defendant must fail.

"* * * Although we must and do assume as true all facts to which Dr. Tuhy testified, we are not required to, nor do we, assume the correctness of any of his conclusions or opinions unless they are

based upon substantial evidence in the record." (p. 621)

"* * * Considering his prior replies and the foundation upon which they were based, is it not manifest that his opinion as to what was 'very likely' or 'probable' constituted but a mere guess on his part and is purely speculative.

"12, 13. An opinion of a medical expert that a result is 'probable' or 'very likely' presents no question for jury determination, unless it is based upon facts and, in the light of all the evidence in the case, is reasonably sustainable. * * *" (p. 629)

"* * * It is obvious from the record that Dr. Tuhy's deduction was based upon an erroneous premise, a premise which finds no substantial support in the evidence. As we point out in our former opinion and as further demonstrated herein, Dr. Tuhy's opinion was purely speculative." (p. 635)

While Appellants objected to the questions propounded Dr. Chamberlain and moved to strike his testimony, the rulings of the court thereon have not been assigned as error for the reason they involved the questions here raised. In *Storla v. S., P. & S. Trans. Co.*, 136 Or. 315, 297 P. 367, 298 P. 1065, the court stated at page 320:

"Even though the rules of evidence may have failed to exclude the conjectures, speculations, or notions of the witnesses, and such incompetent testimony thereby gained its way into the record, yet the party who produced it will not become entitled to a judgment based upon it, because the substantive law requires that findings must be substantiated by evidence which establishes the needed facts: Wigmore on Evidence (2d ed.), § 663; *Goldfoot v. Lofgren*, 135 Or. 533 (296 P. 843)."

There is no competent substantial evidence in the entire record, direct or circumstantial, to support the court's finding of an accidental discharge of the shotgun which preceded and precipitated the onset of the fatal heart attack and such finding can only be based on conjecture and speculation and basing inferences on inferences contrary to Oregon law. ORS 41.330; *McKay v. State Industrial Accident Commission*, 161 Or. 191, 87 P. 2d 202; *Wintersteen v. Semler*, *supra*. In *Vale v. State Industrial Accident Commission*, 160 Or. 569, 86 P. 2d 956, the court stated at page 576:

“Possibilities are not enough; the law requires reasonable probability: (citing cases). Evidence must be substantial in order to carry conviction, and neither jury nor judge are justified in drawing conclusions when the essential facts are left to speculation. That, also, is true of expert witnesses: *Frint v. Amato*, 131 Or. 631, 647, 284 P. 183.”

And in *Lippold v. Kidd*, 126 Or. 160, 269 P. 210, the court stated at page 177:

“Difficulty in establishing a fact should not prompt a court to dispense with proof and impose a liability upon one who did not inflict the injury.”

In view of the restricted nature of this assignment of error, and in an effort to avoid repetition, Appellants have set forth in sub-section (B) the detailed conjecture and speculation, and the pyramiding of inferences on inferences in which Drs. Chamberlain and Rush indulged to arrive at their “opinions,” as well as the equally probable precipitating causes of the fatal heart attack, as such factors incorporate the corollary issues raised on this appeal. However, reference is made thereto for the

purpose of testing the sufficiency of the doctors' "opinions" to constitute competent substantial evidence in the event this court holds the quoted testimony as establishing an accidental discharge of the shotgun prior to the onset of the fatal heart attack.

Appellants contend Dr. Chamberlain's and Dr. Rush's "opinions" fail to raise to the dignity of competent substantial evidence and fail to constitute any proof, an accidental discharge of the shotgun preceded and precipitated the insured's fatal heart attack. The lower court itself, during the trial of this case, correctly stated:

"We do know that the shotgun blast was discharged. Now, whether it was before or after the seizure, we are left to speculate * * *" (R. 378).

and Appellants submit the court erred in finding an accidental discharge of the shotgun preceded and precipitated the insured's fatal heart attack.

B. There is no competent substantial evidence an anguish and pain reflex from the discharge of the shotgun solely and independently of all other causes resulted in the insured's death.

The known fact in this case is that the insured died as a result of a fatal heart attack. The question here presented is whether there is any competent substantial evidence that an accidental discharge of the shotgun created an anguish and pain reflex which, solely and independently of all other causes, was the probable cause of the insured's fatal heart attack.

The Opinions

The net effect of the "opinions" of Dr. Rush and Dr. Chamberlain was, as the autopsy findings failed to reveal any derangements within the heart which could precipitate a fatal heart attack, some outside factor was required and that an anguish reflex, coupled with some pain reflex, from the discharge of the shotgun could precipitate a cardiac arrhythmia, medical shock and death.

Dr. Chamberlain testified it was not common for an emotional or anguish reflex to produce a chain of events resulting in death, in the absence of disease or some physical infirmity (R. 273-275, 304), nor do superficial injuries commonly result in death (R. 305).

Dr. Rush testified the superficial injuries could not have resulted in death (R. 479) and, in the absence of disease, an emotional reflex was not a common cause of death (R. 436-439) and admitting during the entire practice of his specialty he had never certified an emotional reflex to be the sole cause of death (R. 478). During the course of Dr. Rush's deposition he described such an occurrence to be a "very, very rare thing" (R. 450-451, 477-478).

As Dr. Chamberlain and Dr. Rush testified the insured possessed a normal heart for a man in his age category, their "opinions" as to the precipitating cause of death fall in the realm of "medical rarity" and corroborate the "opinions" of Drs. Hunter, Watts and Wilson to the effect that an anguish reflex coupled with the infliction of superficial injuries such as sustained by the insured would not result in death (R. 520-521, 555-556,

581). Dr. Rush likewise so testified during the course of his deposition (R. 476-477).

All medical experts concurred that there are too frequent occurrences of individuals suffering fatal heart attacks notwithstanding negative case histories and normal cardiac tests performed shortly prior to death (R. 583), and individuals can have a fatal heart attack without any pathological findings on autopsy (R. 486, 520).

The "opinions" of Dr. Chamberlain and Dr. Rush must be scrutinized in light of their answers on cross-examination and be analyzed to ascertain whether they are based on conjecture and speculation and not a conclusion resulting from a process of basing inferences on inferences. The most illuminating testimony as to the deficiency of the "opinions" to constitute competent satisfactory evidence is that of Dr. Rush on cross-examination wherein he testified:

"Q. Doctor, on your direct examination you took into consideration the negative findings of Dr. McBride's cardiac tests and his E.K.G.'s; as a matter of fact, Doctor, doesn't it quite often happen that an individual is examined to determine if he has a heart condition, say for insurance purposes or just a periodic check-up, and an electrocardiogram is taken, the usual cardiac tests are given, all of which are negative, and then the individual dies shortly thereafter?

A. That has happened, yes, sir.

Q. And in such cases after an autopsy is performed, isn't one of the common causes that are revealed is a coronary sclerosis?

A. I think that would be a correct statement, but I don't know as to how frequently sclerosis will be the only finding, and of course it would depend upon the amount of the arteriosclerosis, and I be-

lieve some of these—there you will find that there has been several of them that were only small degrees.

Q. And in some of the cases there is no knowledge of any (479) condition of the heart; isn't that correct?

A. Yes, sir.

Q. Now, if that is true, Doctor, you can't rule out the possibility that that couldn't occur in this case?

A. I think that is correct, sir, that you cannot rule it out.

Q. And if Mr. Lyons suffered a heart attack prior to the discharge of a shotgun, you would be sure that was how this affair occurred?

A. Yes, sir, if I knew that I would feel definitely that that was correct.

Q. And, Doctor, from the autopsy report, you do of your own knowledge know that there was some involvement of the coronary arteries and some involvement of the aortic valve?

A. I think that is correct, there is recorded an anatomical description of it, but I do not know that there was any involvement that would be physiologically significant.

Q. My question is that the autopsy revealed that there was some involvement.

A. Yes, sir, there was some involvement, but still in explanation of it, I don't believe that one can interpret that that functionally was not active.

Q. And you do not have knowledge of your own as to the extent of the involvement, do you?

A. Only from the description.

Q. If that involvement was extreme, say, a 90-per-cent (480) involvement of the caliber of the coronary arteries, then your opinion would be that that condition was the direct cause of his death; would it not?

A. Yes, it would, yes, sir, finding there was that much involved, I would certainly say that.

Q. Then, Doctor, not knowing the extent of the

involvement of the coronary arteries and aortic valve, in giving your opinion as to the cause of death, you have sort of weighed in your own mind what the Mexican doctors meant by the use of certain words in their findings; isn't that true?

A. I assumed that the Mexican doctors meant that originally with the description that I thought was present that there was enough involvement to functionally be important. It's been my opinion since having it explained by another Mexican, who has had some knowledge of pathology himself, that it was the same type of findings we would find in many people of that age group that Mr. Lyons was. I just had to change the opinion of what I originally thought that they meant. * * *

Q. But, Doctor, you were required to speculate upon what they meant by their terminology in the report as to the extent of the diminishment of the caliber of the coronary arteries; were you not?

A. I think that that is a true statement, except I would, again, to explain, would expect anybody doing a pathology to have stated that there was a distinct decrease, if there had been a very marked diminishment." (R. 485-489)

The Autopsy Report

Dr. Rush and Dr. Chamberlain in assuming that an outside factor would be required to precipitate the fatal heart attack, ignore the findings revealed by the autopsy report, admitting, however, an aortic insufficiency is an accepted medical cause of a slight hypertrophy of the left ventricle (R. 273, 442); that a narrowing of the coronary arteries from atheromatous deposits can precipitate a fatal heart attack, was a possibility in this case and could not be ruled out (R. 486); and that a gall bladder reflex could precipitate a fatal heart attack (R. 400, 446). These doctors rule out these abnormalities

because the autopsy surgeons did not designate the diminishment of the caliber of the coronary arteries and in the absence of a finding concerning an abnormality in the cystic duct the gallstone could not have passed through (R. 449-450).

Dr. Rush and Dr. Chamberlain conclude the autopsy surgeons were "incompetent" to determine the cause of death and lacked necessary microscopic equipment to perform an adequate autopsy (R. 489). If we accept the premises of Drs. Rush and Chamberlain that the autopsy doctors were amateur pathologists incapable of predicating an opinion as to the cause with the viscera before them and their specific findings of abnormalities are incompetent and of no medical significance, then plaintiff must accept the corollary premise there is no competent evidence a coronary occlusion, a coronary thrombosis or a myocardial infarction did not exist. If the autopsy surgeons were incompetent for one purpose, they must be considered incompetent for all purposes. The fact the autopsy report is silent as to whether or not there was a coronary occlusion or myocardial infarction fails to constitute satisfactory evidence such conditions were not present, which fact was assumed by the doctors in their "opinions" and which usually result in the manifestations shown by the insured during his fatal heart attack (R. 377, 392, 394-395, 404, 407, 409-410).

Chest Pain

Exhibit 18 establishes as a fact the insured suffered attacks of constricting chest and arm radiation pains on February 3 and 4, 1953. Dr. McBride prescribed nitro-

glycerin to be taken on the onset of pain and noted on February 5, 1953, "pain imp." Dr. McBride cautioned Mr. Lyons against "tramping around fields," the very activity the insured was engaged in at the time of his fatal heart attack, as the insured's underarm pain was a brand new symptom (Ex. 2). It was admitted by all medical experts that constricting chest and arm radiation pains are to be considered as "angina pectoris" until proven otherwise and if nitroglycerin relieves such pains the patient has true angina pectoris. Drs. Chamberlain and Rush assume the noted pains to have been from "fatigue." However, Dr. Chamberlain testified:

"The symptoms, in other words, of fatigue differ from the symptoms of coronary pain very strikingly, which an expert, of which actually, second- or third-year medical students are taught to make the differentiation of." (R. 147)

and that the commonest type of fatigue pain is an "aching type" (R. 284). Dr. Chamberlain unwarrantedly assumed the nitroglycerine was prescribed for diagnostic purposes (R. 281) and Dr. Rush unwarrantedly assumed the pain was a continuing one for three days (R. 483-484). Contrasted against these unwarranted assumptions is the inescapable fact the insured had "attacks" of chest and arm radiation pains, nitroglycerine was prescribed to be taken on the "onset of the pain" and the following day Dr. McBride noted "pain imp." If nitroglycerine will not relieve "fatigue" pain, Dr. McBride's record affirmatively establishes as a fact the chest pains resulted from attacks of angina pectoris.

Exertion

The most common precipitating cause of attacks of angina pectoris and death is exertion (R. 274, 485). Drs. Rush and Chamberlain rule out exertion as a precipitating cause based on the physical activity engaged in by the insured the day prior to the fatal heart attack and the exertion of walking on the day of the insured's death. However, we are left to speculate as to the exertion expended by the insured during the 10 to 15 minutes prior to the fatal heart attack (R. 418). The known fact is that he moved 30 yards and retrieved 4 doves (R. 181, App. B, p. 65). Whether he ran or walked we are left to speculate, but Appellants are of the opinion exertion cannot be ruled out by the doctors as a basis of their "opinions."

Time Element

In arriving at their "opinions" Drs. Rush and Chamberlain place considerable emphasis on the time element between certain clinical manifestations dealing in "seconds." As one of the important factors of Dr. Chamberlain's "opinion," he assumed the pulmonary edema developed in "a few minutes" and on cross-examination testified pulmonary edema would not manifest itself at under "3 minutes" (R. 306). Dr. Rush's estimate, on cross-examination, was that the pulmonary edema manifested itself in a maximum of 90 seconds (R. 409-415). The fallacy of using the "guesses" or "estimates" of Dr. Rush as "facts" upon which to predicate an "opinion" the shotgun was discharged prior to the onset of the fatal heart attack is illustrated by the following question and answer:

“Q. Well, from the time elements you have given me, Dr. Rush, from the shot to the stertorous breathing, you said five to ten and not over twelve. Now, something must have occurred prior to that shot to cause the stertorous breathing if it cannot develop within less than 20 seconds, is that correct?

A. All I can tell you is the way I saw these things and the way it appeared to me.” (R. 422)

Appellants submit that if such “estimates” constitute “facts” then the only proven “facts” in the record are that the onset of the fatal heart attack occurred prior to the discharge of the shotgun.

Ventricular Fibrillation or Cardiac Arrhythmia

Dr. Chamberlain assumes the insured had ventricular fibrillation because he died (R. 290). He testified:

“* * * there were several things in this situation which could have produced ventricular fibrillation” (R. 289).

and admitted it might be precipitated by an underlying heart disease of a coronary nature which is probably a predisposing factor in any given case or which may be a precipitating factor in any case (R. 287). Dr. Rush testified:

“Q. Now, is it your testimony, Doctor, that an emotional upset and the infliction by the superficial injuries to the face will solely and independently of all other causes result in death?

A. No; I didn't state that.

Q. Pardon me?

A. I don't believe I ever stated it that way.

Q. I am asking you if you so state—will you read the question?

A. No; I didn't so state. (425)

(Question read.)

A. And I answered I didn't so state, nor would I so state now.

Q. Well, what is the net effect of your statement that there was an explosion, the reflexes and go through to the terminal point of death, isn't that the same question, practically?

A. No; I wouldn't think it was because many people can have a superficial wound and can have an explosion and would not have an arrhythmia that would follow it, wouldn't have shock, wouldn't have congestive failure. *Those other things had to follow those initiating chain of events whatever initiated the chain of events.* In fact, if you are going to use one thing on this as the most likely way to express it, but I—what I thought it would be, the arrhythmia produced the death. I merely thought the other things caused the arrhythmia." (R. 436-437) (Emphasis supplied.)

Inferences

The only established fact was the insured died of a heart attack and to arrive at the conclusion the heart attack was caused by an accidental discharge of the shotgun the following inferences must be indulged in:

(1) That the discharge of the shotgun preceded the onset of the fatal heart attack.

(2) That the discharge of the shotgun was capable of creating an emotional trauma or anguish reflex coupled with a pain reflex.

(3) That the emotional trauma or anguish reflex and pain reflex precipitated a ventricular fibrillation and cardiac arrhythmia incompatible with life.

(4) That although an emotional trauma or anguish reflex coupled with a pain reflex will not commonly pre-

cipitate a ventricular fibrillation or cardiac arrhythmia incompatible with life, in the absence of some bodily infirmity or disease, however, in this instance, said reflexes solely and independently of all other causes resulted in the insured's death.

Equally Probable Causes

(1) That although there are too frequent occurrences of individuals suffering fatal heart attacks notwithstanding negative case histories and normal cardiac tests having been performed shortly prior to death, that such did not occur in this case.

(2) That although the autopsy report revealed there was a derangement within the heart, the pathological findings could not have precipitated the fatal heart attack.

(3) That the insured's chest pains of February 3, 4 and 5, 1953, were not attacks of angina pectoris.

(4) That although an attack of angina pectoris could have precipitated the fatal heart attack, and was a possibility, such did not occur in this case.

(5) That although exertion is a more common precipitating cause of a fatal heart attack, the insured was not engaged in exertion.

(6) That although a viscus reflex from a gall bladder attack can precipitate a fatal heart attack such did not occur in this case.

(7) That although a coronary occlusion or myocardial infarction could have precipitated the fatal heart attack such did not occur in this case because the autopsy report did not incorporate a finding of those conditions.

(8) That although there are numerous factors which can precipitate cardiac arrhythmia and ventricular fibrillation an emotional or anguish and superficial pain reflex was the more probable precipitating cause of the fatal heart attack.

Authorities

The basing of inferences on inferences is prohibited by O.R.S. 41.330, and in *McKay v. State Industrial Accident Commission, supra*, a complete discussion of basing an inference upon an inference may be found. In that case the decedent received an electric shock. Thereafter on proceeding home his car left the pavement, he was thrown to the pavement, and died. It was the theory of plaintiff that McKay's death was due to heart failure as a result of heart fibrillation induced by electric shock and the court stated:

"1, 2. Without the testimony of medical experts as to the probable cause of death no one, we apprehend, would contend that any of the numerous possible causes presented could be seized upon as more likely than another. But, as we view it, the expert testimony does not make the case any stronger. We have recently held that the rule which forbids a jury to speculate on the cause of a death or injury applies also to the opinion evidence of medical experts: *Leona May Vale v. State Industrial Accident Commission*, 160 Or. 569, 86 P. 2d 956. The testimony of Dr. Erwin and Dr. Coe that McKay's death was due to an injury to his heart has only one possible basis, and that is the fact that the man died. Without that there is no evidence whatever from what such an injury can be found, and the doctors did not claim that there is. All that could be definitely known about the decedent was that he had received an electric shock and that he died in an automobile

accident a few hours later. But the cause of death was the question at issue, and in whatever form of language the experts might choose to clothe their opinions they necessarily arrived at them by assuming as a fact the very thing that was in dispute. In other words, they reasoned that because McKay sustained an electric shock he came to his death, and because he died the electric shock must have produced an injury to his heart capable of causing death or a collapse. This is not reasoning from cause to effect; it is reasoning in a circle.

"We therefore agree with Dr. Erwin that to assume that electric shock was the cause of McKay's death is assuming a great deal, and that with respect to the question whether electric shock caused his automobile to go off the highway, 'it is just as easy to assume one thing as another.' * * *

"3, 4. In this state the doctrine that an inference may not be based on an inference is a creature of statute: § 9-804, Oregon Code 1930. It has been applied in a number of cases, among which may be mentioned: *State v. Hembree*, 54 Or. 463, 103 P. 1008; *Lintner v. Wiles*, 70 Or. 350, 141 P. 871; *Stamm v. Wood*, 86 Or. 174, 168 P. 69; *Deniff v. Charles R. McCormick & Co.*, 105 Or. 697, 210 P. 703; *Hayes v. Ogle*, 143 Or. 1, 21 P. 2d 223." (p. 198-199)

"5. On the other hand, it is not permitted to assume a fact that has not been legally proved and on such an insecure foundation to build a conclusion. And so it is said in *State v. Clark*, supra, in explaining the basis of the decision in *State v. Hembree*, supra:

"'Each inference was a *non sequitur*, and had no foundation upon which to rest. This court refused to tolerate such a piling of inferences upon each other and pointed out that not even the principal fact upon which they were supposed to rest had been proved.'

"The instant case illustrates, in one aspect, an attempt to apply the rule improperly, and in another aspect, its right application. The circumstances in evidence on which the plaintiff relies to prove that the decedent sustained an electric shock are 'so related to each other that it would be illogical to assume that they could all exist coincidentally and the fact in dispute be nonexistent.' But the conclusion that the decedent's death was caused by electric shock is based on the inference that the shock caused an injury to his heart capable of producing death. That, as this court said with reference to the evidence in the *Hembree* case, is a *non sequitur*. There is no evidence of injury to the decedent's heart. It is a mere possibility lacking proof, and this possibility is necessarily the foundation of the plaintiff's claim, and so the case is exactly like *State v. Hembree*, *supra*, and the other cases decided by this court where evidence has been held insufficient or inadmissible because it consisted of inferences based on inferences.

"It could as well be said that, as between two possible causes of decedent's death, no evidence has been produced which makes one cause appear as more probable than the other, or enables the triers of the facts to do other than guess at the solution of the mystery. In that situation the plaintiff necessarily must fail." (p. 200-201)

In *Wintersteen v. Semler*, *supra*, the court stated at page 612:

"It is urged that the only established fact or the fact proved was that plaintiff had an abscess, and that to arrive at the conclusion that such abscess was caused by plaintiff's position on her back, the following inferences must be indulged in: (1) that foreign matter got into plaintiff's trachea; (2) that such matter proceeded into plaintiff's lungs; (3) that such matter was infectious, and (4) that such infectious material caused the abscess. * * *

“So, in the instant case the only known or proved fact is that plaintiff had an abscess, and, to arrive at the conclusion that such abscess was caused by the improper position of plaintiff on her back, Doctor Tuhy had to indulge in the several inferences hereinbefore set out. It is well known that a person may suffer an abscess from various causes, and to say that plaintiff’s abscess was caused in the manner delineated by Doctor Tuhy would be pure conjecture and highly speculative.”

When the facts are as equal with one theory as another and the defendant is liable for only one of them, the court is not permitted to engage in speculation and conjecture. In *Annereau v. Ewauna Box Co.*, 176 Or. 509, 159 P. 2d 215, the deceased was found dead in a fuel house partially covered with sawdust with an abrasion on his head. Plaintiff contended the deceased fell and struck his head and was smothered to death. An autopsy was performed which revealed no significant changes in the valves, muscles and blood vessels of the heart and the pathologist testified there was nothing about the heart condition which could have prevented the decedent from living a normal life. There was also evidence the man suffered from a pathological cardiac condition not revealed on autopsy. The court stated at pages 515-517:

“In the instant case, however, more than one chain of circumstances is in evidence. Appellant selects one, namely, that Wood was found dead, lying in the fuel house. His head was injured. His body was buried in sawdust, and some sawdust was in his mouth and nostrils. The conveyor chain was running empty. From these facts he deduces that decedent was suffocated by being buried in a collapse of fuel, and that most of the collapsed fuel was

afterwards carried off by the conveyor. Respondent, on the other hand, suggests that it is impossible, from the evidence, to deduce the cause of death with reasonable certainty. We are inclined to agree. There was evidence that the man suffered from a pathological cardiac condition, and the proof indicated that he died from suffocation produced by aspiration of vomit, which probably resulted from his heart condition. He may have fallen on the conveyor chain and injured his head and afterwards dragged himself into the position in which he was found. He was lying on, or in, a low ridge of fuel to the south of the conveyor, and the circumstances are susceptible of the deduction that he collapsed against this ridge, and that sawdust therefrom settled partially over his body. It is true that the vomiting may have resulted from pressure of sawdust, but it is at least equally probable that it resulted from heart failure. It would seem to be unlikely that the slight head injury was caused by sawdust falling upon the man, and much more likely that he fell and struck his head against the conveyor in falling.

“3, 4. The facts are as consistent with respondent’s theory as with appellant’s. The circumstantial evidence, with equal reason, might have supported two different conclusions respecting the proximate cause of Wood’s death, for one of which the respondent could not have been held liable. The jury, in our opinion, could, in any event, have found a verdict against respondent only by resorting to speculation and conjecture, in which the law does not permit them to indulge. We think that the trial judge ruled correctly in sustaining respondent’s motion for a judgment of involuntary nonsuit. (Citing cases.)”

In *Spain v. Oregon-Washington R. & N. Co.*, 78 Or. 355, 153 P. 470, a case involving infection, the court stated at page 369:

"Now, from this testimony, which is wholly from plaintiff's witnesses, there may be drawn several inferences: (1) That the inflammation which ensued upon the 21st was a mere phase of an infection already shown to exist in the wound; (2) that it arose from plaintiff's activities around the race-track at Boise; (3) that it came from unsterilized dressings applied by Mrs. Simms before plaintiff's departure to Boise; or (4) that it arose from unsanitary condition existing in the jail at Huntington. There is no evidence which has a tendency to show from which of these causes the subsequent aggravated condition arose. * * * When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration: *Armstrong v. Town of Cosmopolis*, 32 Wash. 110 (72 Pac. 1038)."

In *Parker v. Pettit*, 171 Or. 481, 138 P. 2d 592, a malpractice case wherein recovery was awarded by the jury for loss of an eye, plaintiff's sole expert witness, Dr. Nelson, testified on direct examination that a gauze packing was the cause of the loss of the eye and that radium had nothing to do with it. On cross-examination, however, he admitted that radium could destroy the eye. The court stated at page 489:

"Has it been established with reasonable certainty that leaving the gauze packing in plaintiff's antrum was the cause of the loss of her eye? Or was such damage caused by the radium treatment? Defendant is not charged with negligence in administering the radium. He would not, therefore, be responsible for any damage to the eye by reason of the use of radium to kill the cancer. The evidence viewed in the light most favorable to plaintiff is that the loss of the eye might, with equal proba-

bility, be caused either by the gauze or radium. The testimony of Dr. Nelson concedes that such is true and the evidence on behalf of the defendant is that the gauze had nothing whatever to do with such damage. Under that state of the record the jury was left only to speculate as to that phase of the case. Hence the plaintiff was not entitled to the award of \$10,000 for loss of the eye and the court was right in eliminating such sum from the judgment."

It is axiomatic that no finding can stand that depends upon conjecture and speculation. *Lemons et al v. Holland et al.*, 205 Or 163, 284 P. 2d 1041, 286 P. 2d 656; *Quetschke, Adm'x v. Peterson and Zeller*, 198 Or. 598, 258 P. 2d 128; *Devine v. Southern Pacific Co.*, *supra*.

The mere fact that the insured's death followed an injury is not proof that death resulted therefrom. The connection between the two must be proven with reasonable certainty. *Hutchison v. Aetna Life Insurance Company*, *supra*.

Drs. Rush's and Chamberlain's "conclusions" are violative of the foregoing well enunciated rules of law. They assumed the very fact in issue, the discharge of the shotgun prior to the onset of the fatal heart attack to arrive at their "opinions" as to the physiological chain of events resulting in death. The doctors engaged in speculation and conjecture and based inferences on inferences. The additional deficiencies of their "opinions" as enunciated in argument (A) are incorporated herein. Such testimony does not constitute substantial evidence upon which the court could predicate its findings an

accidental discharge of the shotgun inflicted bodily injuries which solely and independently of all other causes occasioned the insured's death.

C. There is no competent substantial evidence the death of the insured was not caused or contributed to by disease.

Dr. Rush in his affidavits (App. B, pp. 56-62) and on deposition testified that the insured had a "diseased" condition of the heart, without which an anguish and pain reflex would not have resulted in the insured's death (R. 477). On trial he testified to the effect the insured possessed a normal heart for a man in his age category (R. 359) by engaging in speculation and conjecture (R. 487-489). On cross-examination he testified:

"Q. Well, you certainly have a conclusion as to whether or not a diseased condition of the heart contributed to the heart's death?

A. I think his heart did contribute to the death.

Q. Did a diseased condition of his heart contribute to his death?

A. Depends upon what you mean. It is not a heart that is perfect." (R. 465)

Dr. Chamberlain testified to the effect the insured possessed a normal heart for a man in his age category (R. 252) by engaging in speculation and conjecture (R. 266, 271, 312). His testimony to the effect that an abnormal rhythm is more apt to develop in the heart as a result of some underlying disease (R. 229) and an emotional factor would not precipitate coronary insufficiency unless there was something else physically which inter-

vened (R. 274-275), infers a diseased condition existed in the insured's heart.

Such "opinions" fail to constitute substantial evidence to support the court's finding the insured's death was not caused or contributed to by disease.

CONCLUSION

Appellants submit there is no competent substantial evidence to support the trial court's findings of fact V and VI. Appellee's judgments should be set aside and judgments entered in favor of Appellants.

Respectfully submitted,

R. E. KRIESIEN,
RAY MIZE,
Attorneys for Appellants.

MEINDL, MIZE, & KRIESIEN,
1431 American Bank Building,
Portland 5, Oregon,
Of Counsel.

APPENDIX A**TRANSLATION**

RAMON CASTRO GULUARTE, Delegate of the Southern Territory of the Lower California, acting as Officer of the Civil Registry in the jurisdiction of San Jose del Cabo,

CERTIFIES:

That in Book number one of Death Records of the year 1953, pages 3, 4 and 5 there is written the following minute: ON THE MARGIN:—Number five.—Death of Mr. James A. Lyons.—AT THE CENTER: In the port of San Jose del Cabo Southern Territory of the Lower California, at eleven 11 o'clock february 12, 1953, I Ramon Castro Guluarte, Government Delegate, acting as Officer of the Civil Registry, received the communication number 30, file A.-3.-7.-(7) 953 of the same date, issued by the Prosecutor reading as follows: "Pursuant to prior proceeding carried out by this Office under my charge, concerning the case of a man of Northamerican nationality who was found dead on the lands called "Los Llanos" of this Jurisdiction, a resolution reading as follows was issued: San Jose del Cabo, B.C., February 12, 1953, the Prosecutor, acting in his capacity, attested by the witnesses resolved: that inasmuch as the denunciation made by telephone by the Subdelegate of the Government at Cabo de San Lucas Mr. Fausto Peralta Banaga after having found dead in "Los Llanos" a man of North-american nationality and according to the Doctor Certificate issued by Dr. Armando Serrano Anaya and Dr.

Eduardo Rodriguez Cota who practiced the autopsy on the body of a man who was called James A. Lyons, a Northamerican national, which established that the corpse was examined and that the death was due to an aortic insuficiency which caused a suden cardiac fatigue having found also ateromatic plates in the coronaries. In view of the above and prior to the identification of the corpse and with the transcription of the present resolution send a communication to the Judge of the Registry of this town to the effect that a minute by inserted in the Book of Death records of this year, for which purpose description of the deceased are hereby given, according to the identification of the corpse, as follows: James A. Lyons, Northamerican national, married, fifty years of age, his wife is Jane Lyons, residence: Smore Treeranch, Palm Springs, California, U.S.A.—This transcription, attached to the Doctor Certificate, which is to be returned, has to be inserted in the correspondent minute".—The Doctor Certificate is as follows: The undersigned, Medical Doctors and Surgeons, legally authorized to practice medicine and having being requested according to Articles two hundred twenty and two hundred twenty one of the Organic Law of the Court of Justice of the District and Federal Territories to practice the legal autopsy on the corpse of Mr. James A. Lyons, hereby Certify: "that the death was due to an aortic inssuficiency which caused a suden cardiac fatigue having found also ateromatic plates in the coronaries". At the request of Mr. Robert J. Parrick we issue this Certificate at Villa de San Jose del Cabo. B.C. on the 11th of February year nineteen fifty three.—Signed, Dr.

Armando Serrano A, signed, Dr. Eduardo Rodriguez C. signed, Alberto Cesena Dodero, Prosecutor. According to Article 122 of the Civil Code the insertion is hereby made.—The Delegate of the Government acting as Officer of the Civil Registry, Ramon Castro Gluarte. Ilegible signature.

This is an exact copy of the original which is issued at the request of Mr. Robert J. Parrick, at the port of San Jose del Cabo, Southern Territory of the Lower California, on February twelve nineteen fifty three.

(a seal of the
Civil Registry)

The Delegate of the Government
acting as Officer of the Civil Reg.

By, Ramon Castro Guluarte
(ilegibly signature)

APPENDIX B

PROOF OF DEATH

Statement of Beneficiary by Authorized Attorney

STATE OF OREGON)
) ss.
 County of Multnomah)

I, ROBERT F. MAGUIRE, being first duly sworn, on oath, depose and say that I am the attorney at law for Jane S. Lyons, the beneficiary under the within described policies and certificates; that I am duly authorized by said Jane S. Lyons to make this proof of death on her behalf and that the following proof of death is true as I verily believe:

The name of the deceased, insured under the within described policies, was James Alexander Lyons who resided at Coos Bay, Oregon, whose occupation was lumberman and who was born December 30, 1904 and who died February 10, 1953 at Los Llanos, Lower California, Republic of Mexico. This proof of death is furnished in connection with certificate Nos. 0-5058-1 in the principal sum of \$25,000.00 and O-OM-C-1740 in the principal sum of \$75,000.00, issued by Underwriters at Lloyd's, London. The beneficiary thereunder is Jane S. Lyons, widow of said James Alexander Lyons and who was born January 8, 1914, residing at Coos Bay, Oregon.

The death of said James Alexander Lyons occurred on the date and at the place above mentioned as follows: while hunting doves his shotgun accidentally fired caus-

ing powder burns and wounds upon the neck and face which produced shock and an angina and an anoxemia of the ventricular muscles of the heart producing a ventricular flutter or fibrillation which ended in death.

The cause of death was an accidental discharge of the shotgun causing burns and wounds of the neck and face which precipitated an acute angina with some coronary occlusion and ventricular fibrillation resulting in death.

At the request of the Underwriters there are attached hereto the following documents:

1. Photostatic copy of certificate bearing the seal of the Civil Registry of San Jose del Cabo, Southern Territory of Lower California, Republic of Mexico, together with three copies of translation thereof;

2. Photostatic copy of document in Spanish bearing seal of "Delagacion Sanitaria, San Jose del Cabo, Lower California, Republic of Mexico" and bearing the signatures of Dr. Armando Serrano A. and Dr. Eduardo Rodriguez C., and which apparently is an autopsy report concerning James Alexander Lyons;

3. Three photostatic copies of document in Spanish which apparently is a resumé or certificate of inquest conducted by Mexican authorities together with three translations thereof;

4. Three copies of affidavit of Rosa M. del Paso relating to her translation of said documents.

There are also attached hereto:

1. Affidavit in triplicate of Dr. Homer P. Rush, specialist in internal medicine, with particular attention to diseases of the heart, an eye witness to the death of said James Alexander Lyons dated March 31, 1953;

2. Affidavit in triplicate of said Dr. Homer P. Rush dated July 10, 1953.

/s/ Robert F. Maguire

Subscribed and sworn to before me this 13th day of
October, 1953.

SEAL

/s/ Lillamae Wentz

Notary Public for Oregon

My Commission Expires: Feb. 13, 1954

HOMER P. RUSH, M.D.—MATTHEW C. RIDDLE, M.D.
Physicians

919 S. W. Taylor Street — Portland 5, Oregon
Broadway 0168

[illegible]

I, HOMER P. RUSH, being first duly sworn, upon oath depose and say: That I am a regularly licensed physician under the laws of the State of Oregon, and my offices are in the city of Portland therein; that I have been actively engaged in the practice of medicine for over 25 years; that I have, for many years, specialized in internal medicine and diagnosis, with particular attention to the diseases of the heart; that I am, at present, Clinical Professor of Medicine, Head of the Section

of Cardiology, in the University of Oregon Medical School.

That I knew, and was acquainted with, James A. Lyons, (sometimes known as James Alexander Lyons) and was present at the time of his death on February 10, 1953. On the morning of that day, in his company, and that of several others, I had been driven upon the beach above the seashore near the village of San Marco, which is near La Paz, Baja California, Mexico, to hunt doves. I was a few yards distant from him at the time his shotgun was discharged. Shortly thereafter, I heard groans, or more accurately, stridulous breathing coming from where he had been standing and I proceeded immediately to the spot, finding him prostrate and lying partially under a large bush. I turned him over and found that the gun, in its discharge, had powder burned his face, which was bleeding from slight lacerations probably caused by one or more shot pellets or wadding when the gun was discharged. He was cyanotic and pulseless. He expired in some five to ten minutes. I have talked with Drs. Armando Serrano Anaya and Eduardo Rorigues Cota who performed the autopsy on the body of said James A. Lyons.

From my own observations made at the time of his death, which are corroborated by the autopsy report, I certify that James A. Lyons had an underlying coronary artery disease and that when the shotgun was discharged, the explosion and concussion produced a shock which precipitated an acute angina, causing some coronary occlusion and a sudden ventricular fibrillation of

the heart which caused his death within five to ten minutes after the accidental discharge of the gun in close proximity to his face.

/s/ HOMER P. RUSH, M.D.

SUBSCRIBED AND SWORN to before me this 31 day of March, 1953.

SEAL

/s/ FRANCES LEE DIEKMEIER
Notary Public for Oregon
My Commission expires: 8-4-54

STATE OF OREGON)
) ss.
COUNTY OF MULTNOMAH)

I, HOMER P. RUSH, being first duly sworn, upon oath depose and say: That I am a regularly licensed physician under the laws of the State of Oregon, and my offices are in the City of Portland therein; that I have been actively engaged in the practice of medicine for over 25 years; that I have, for many years, specialized in internal medicine and diagnosis, with particular attention to the diseases of the heart; that I am, at present, Clinical Professor of Medicine, Head of the Section of Cardiology, in the University of Oregon Medical School.

That I knew, and was acquainted with, James A. Lyons (sometimes known as James Alexander Lyons), and was present at the time of his death on February 10, 1953. On Monday, February 9, 1953, we were cruising down the Gulf of Lower California on the peninsula side. That afternoon a large marlin was hooked, Mr. Lyons had the rod and went through reasonably severe

physical exertion for some fifteen to twenty-five minutes. I was sitting and standing by him during this entire episode. I noticed no evidence of dyspnea, cyanosis or other signs or symptoms which might suggest heart strain. He did not complain of any pain or discomfort, and appeared to be in good health.

When we anchored in the harbor at San Lucas, the port captain name unknown and ship broker, Senor Ruiz, came aboard. Because they told us of the excellent dove hunting which was available, we arranged to meet Senor Ruiz and go dove hunting the next morning. We arose about 6:00 a.m. on February 10, 1953. Mr. James Lyons, Mr. Robert Parrick, Doctor Francis Chamberlain and I went ashore. We took a shotgun (12 gauge Magnum) and a .22 rifle from the ship. We also had available a 12 gauge shotgun and a .22 rifle that belonged to the Mexicans. We drove through the village of San Lucas in Senor Ruiz' car, stopped and picked up his 10 or 12 year old son who accompanied us and drove several miles into the country, being back about a mile or so from the seashore. The country was brushy and filled with small trees. We parked alongside the road.

Mr. Robert Parrick took Senor Ruiz' shotgun, Mr. James Lyons used the shotgun from the ship, Senor Ruiz used his .22 rifle and I used the .22 rifle from the ship. Doctor Francis Chamberlain elected to walk back through the village to take pictures as there were no more guns available. We started to hunt about 7:30 a.m. The morning was beautiful; the landscape attractive. Mr. Lyons and I talked for several minutes about how nice it was to be alive on such a beautiful morning.

He was in the best of spirits and seemed physically fit. We had taken a short stroll up a side path looking at the vegetation.

Doves began to come over and he had shot 3 or 4 birds when we were together. It was obvious that he was very familiar with firearms and very careful in his manner of handling a gun. He shot one dove that fell behind a ridge and Senor Ruiz left us to retrieve this dove. Having a rifle and being not too far distant from a tree in which doves were landing, I was placed in this position and Mr. Lyons was down the road and off to the side which seemed to be a good point in the flyway. I would estimate that he was some 50 yards from me. The morning was quiet and there was no extraneous noise. While waiting for doves to alight in this tree, I heard a shotgun explosion behind me coming from the direction where I knew Mr. Lyons was hunting. I turned around and saw a dove fall. This was followed almost immediately by a second shotgun explosion which I believe was not more than 10 to 20 seconds after the first gun explosion. I saw no bird fall from this second shot nor did I see any birds flying overhead. However, at that moment I did have my back turned towards the location where Mr. Lyons was standing. Within a matter of a very short time, I would estimate not over 15 seconds, I heard a peculiar stridulous wheezing noise from the direction of Mr. Lyons. This was distinctly at a later time element than the second shotgun explosion. My first reaction was "is this the noise of a mad dog or a wheezy bull" and as I walked down the road I wondered what I would do with a .22 rifle with such an animal. I then

saw Mr. Lyons lying under a low mesquite-like bush, face down with his gun beneath him and under his chest with the barrel extending several inches from the point of his shoulder on the left side. He was cyanotic, having marked difficulty with stridulous breathing and pulseless when I arrived by his side. As I approached this man I noticed blood on the right side of his face and called for help. Senor Ruiz arrived first within a few seconds, and Mr. Parrick and Senor Ruiz' son arrived a minute or so later. We rolled him over, tried to get a better position for breathing, he remained pulseless, and there was but a very small spot of blood on the ground and no great hemorrhage from the superficial wounds on his face and neck on the right side.

Following this accident, the ground and brush were carefully examined by the group of us and we could make out no evidence of soil displacement nor broken brush which could have resulted from the discharge of a shotgun.

I learned later this man had been checked over by Doctor William McBride of Palm Springs a day or two before this trip. He had been assured that his general status was good, that he was tired and probably needed a vacation. He had given such information in conversation to Doctor Chamberlain the night before.

The autopsy showed a coronary sclerosis.

It is my medical opinion that this man was in good physical condition the morning of this accident with no evidence of cardiac strain, nor had he been under any exertion or excitement that would have produced cardiac

strain previous to the explosion of the shotgun which caused the superficial wounds. It is my opinion that the second explosion of the shotgun which I have mentioned above was an accidental discharge of the shotgun, next to his face which, in addition to the wounds above mentioned, produced a marked emotional reaction that precipitated an angina which caused an anoxemia of the ventricular muscles of the heart producing a ventricular flutter or fibrillation which ended in death. It is further my opinion that had it not been for the accidental discharge of the gun above described he would not have suffered the angina and he would not have suffered the heart seizure and would not have died at that time.

It is my opinion that the sequence of events was:

- (1) accidental explosion of gun with superficial wounds of the right side of the face and neck which produced an angina followed by
- (2) ventricular arrhythmia which produced death.

In my opinion the sequence of events and the time elements involved therein eliminates any probability that the onset of the heart attack precipitated the accidental discharge of the shotgun; but, on the contrary, established with reasonable certainty that the second explosion of the shotgun precipitated the onset of the heart attack.

/s/ HOMER P. RUSH

Subscribed and sworn to before me this 10 day of July, 1953.

SEAL /s/ FRANCES LEE DIEKMEIER
 Notary Public for the State of Oregon
 My Commission Expires 8/6/54

Jose Prisciliano Cesena Cesena and Abel Green Manriquez, in their usual capacity of witnesses of the Public Ministry at San Jose—del Cabo, Southern Territory of the Lower California, hereby—CERTIFY:—That in file number 7 inchoated on February 10, 1953,—pursuant to prior investigation carried out due to the accidental death of the North American citizen Mr. JAMES A. LYONS, it—appears the following:

EVIDENCES:

On February 10, 1953 the Prosecutor was informed by telephone, by the Sub-Delegate of the Government at Cabo San Lucas, that on the same date, at 1 o'clock, a man of North American nationality was found dead at "Los Llanos" of this jurisdiction. On February 10, 1953, the undersigned, Prosecutor at San Jose del Cabo, Southern Territory of the Lower California RESOLVED:—To carry out an investigation, and in case of delinquency, denunciate it to the competent authorities.—To appoint Dr. Armando Serrano Anaya and Dr. Eduardo Rodriguez Cota, from Hospital Dr. Raul Carrillo of this town, to examine and practice the legal autopsy of the corpse, in order to determine the cause of the death.—According to Articles 1, 5 and 24 of the Organic Law and 21 of the Fundamental Ordinance, judicial formalities are to be performed at the place where the corpse was found, by the mentioned physicians and personnel of this Office.—Signed before witnesses, Alberto Cesena Dodero, Prosecutor.—Registered number 7 of the same date. On February 10, 1953, Dr. Armando Serrano was called by this Public Ministry to

examine, with Dr. Eduardo Rodriguez Cota, the corpse of the North American national who was found dead at "Los Llanos" of this jurisdiction.—In my presence and that of the witnesses, declared, under oath, the following:—To be named Armando Serrano Anaya, 28 years of age, Medical Doctor and Surgeon legally authorized to practice medicine, born at Mexico City, with address in this Port.—Having accepted his nomination, signed this minute before me, Prosecutor, and witnesses.—At the margine :—Dr. Armando Serrano Anaya, signature.—On the same date, Dr. Eduardo Rodriguez Cota, who was called by this Public Ministry to examine, with Dr. Armando Serrano, and practice the legal autopsy of the corpse of the North American national who was found dead at "Los Llanos" of this jurisdiction, declared: To be named as it is above stated, Mexican nationality, catholic, married, Medical Doctor legally authorized to practice medicine, 26 years of age, born at La Paz, B.C., with address in this Port.—Having accepted his nomination wigned this minute before me, Prosecutor, and attesting witnesses.—At the margine: Dr. Eduardo Rodriguez Cota, signature.—At the center: Alberto Ceseña Dodero, Prosecutor, signature.—J. Prisciliano Ceseña C, Witness, signature.—Abel Green M, Witness, signature.

In the fields calles "Los Llanos" at Cabo San Lucas, jurisdiction of San Jose del Cabo, Wouthern Territory of the Lower California at 10 o'clock, February 10, 1953, members of this Public Ministry and Doctors Armando Serrano Anaya and Eduardo Rodriguez Cota, —attested to have found a masculine body of North

American nationality, wearing blue trousers, gray shirt with short sleeves, gray socks and brown shoes. The body was laying on its right side from North to South, under some bushes near the road; the head over a sack, the arms outstretched ahead and the legs bent at the knees; rigor mortus had set in, specially around the face and neck.—At 3, 12 and 16 meters South the corpse, were found 4 dead doves. There was blood on his face and neck, but none on his body or on the ground. The body belonged to a man of about 55 years of age, strong build, white complexion, about 1.65 meters in height, abdominal perimeter 85 centimeters, thorax perimeter 93 centimeters, abundant gray hair, green eyes, flat nose, black eyebrows, normal size mouth, clean shaved.—The body was cold and rigid. Incrusted in the neck, right side of the fact, eye-lid and ear, were found gun-powder grains. In the right side of the forehead, near the hair line, was found a hold of about 1 milimeter in diameter. Also were found excoriations in the right arm and hand.—We attest to the above description.—The Prosecutor, Alberto Cesena Dodero, signature.—Witness, Jose Frisciliano Cesena C, signature.—Witness, Abel Green Manriquez.

Feb. 10, 1953.—Immediately after the above, the Prosecutor ordered to remove the corpse to Hospital "Dr. Raul Carrillo" at San Jose del Cabo, B.C., in order to proceed to its identification and legal autopsy that would be performed by Doctors Armando Serrano and Eduardo Rodriguez Cota.—To identify the corpse were called Dr. Homer P. Rush and the airplane pilot Robert J. Parrick.

San Jose del Cabo, B.C, February 10, 1953.—As Mr. Robert J. Parrick and Dr. Homer P. Rush do not speak Spanish, the Prosecutor ordered, according to Article 183 of the Penal Code, that their declarations be translated into the Spanish language by Mr. Manuel Galindo S, and Mr. Eduardo Ruiz Cassezus.

In my presence and before witnesses, Mr. Manuel Galindo called to translate into the Spanish language the declarations made towards the identification of the corpse, declared the following: To be named as it is above stated, Mexican nationality, catholic, married, Federal employee, 47 years of age, born at this town.—Having accepted his nomination, Mr. Galindo S. signed this minute before me, Prosecutor, and witnesses.—At the margine, M.Galindo S, signature—

On the same date, February 10, 1953, prior summon of this Public Ministry, the other interpreter declared to be named Eduardo Ruiz Cassezus, 47 years of age, Mexican nationality, catholic, married, merchant, born at this town.—Having being notified that the purpose of this citation was to translate into the Spanish language the declarations made towards the identification of the corpse, he accepted and signed before me, Prosecutor, and witnesses.—In view of the foregoing, the day record of proceedings is ended.—In witness whereof, I, Prosecutor hereunto set my hand.—Alberto Cesena Dodero, signature.—J.Prisciliano Cesena.—Abel Green M, witnesses, signatures.

San Jose del Cabo, Southern Territory of the Lower California,—February 11, 1953.—Congregated at Hos-

pital "Dr. Raul Carrillo" of this town, were members of the Public Ministry of San Jose del Cabo, witnesses, interpreters, Dr. Homer P. Rush and the airplane pilot Robert J. Parrick.—Dr. Rush, under oath to tell the truth, declared to be a North American citizen, catholic, married, 56 years of age, Medical Doctor, born at Omaha, Nebraska, U.S.A.—When asked for his passport, he said that he left it at the Yacht.—Questioned as to the identity of the corpse, he stated it to be a of man called JAMES A. LYONS, North American citizen, about 55 years of age, married, with address at Palm Spring, California, that they had met approximately a week before and became good friends.—He also informed that Mr. Lyons was co-owner of the Yacht in which they were traveling, and that he did not know his wife nor his parents, but was told by Mr. Lyons that he had 3 children and his wife's name is Jane Lyons.—As he was questioned about the events that brought about the present procedures, he replied that Mr. Robert J. Parrick, Mr. Lyons, Mr. Antonio Ruiz C., a Mexican boy and himself, went to Los Llanos on February 10, 1953 with the purpose of hunting doves. The deceased and Mr. Parrick carried 12 gauge shotguns, Mr. Ruiz and himself carried 22 caliber rifles.—Upon their arrival, each went in different directions. At approximately 50 feet distance, he heard two shots, and another shortly after followed by somebody crying out in pain. Supposing that something wrong happened, he immediately went to the place that the voices were coming from, and found Mr. Lyons under some bushes, unconscious and breathing difficult and desperately. As he

called for help, Mr. Ruiz arrived. While they were trying to help him, Robert and Antonio's son came. When they carried him from the bushes, they noticed that one side of his face was superficially wounded and bleeding slightly. He died about five minutes later.—Robert J. Parrick took off his shirt and covered Mr. Lyons' face to protect it from the sun. Antonio Ruiz went to notify the Cabo San Lucas authorities of the incident.—Dr. Rush's belief is that James Lyons' death was accidental, caused by the discharge of the shotgun he carried, and also certifies that he was happy and in good health before the fatal accident.—Latter on, the Sub-Delegate of the Government at Cabo San Lucas arrived, and after taking declarations, returned to Cabo San Lucas leaving a Policeman in charge.—This declaration was given by Dr. Homer P. Rush and translated by the interpreters.—After being read and approved, it was signed before me, Prosecutor, and the witnesses.—Homer P. Rush, M. Galindo S., Eduardo Ruiz C., (signatures).

Following act. — February 11, 1953. — Before the Prosecutor, attesting witnesses, and the interpreters Manuel Galindo S. and Eduardo Ruiz C., Mr. Robert J. Parrick, who was summoned by this Public Ministry to identify the corpse, declared under oath, to be a North American citizen, single, 36 years of age, airplane pilot, born at Twin Falls, Idaho, U.S.A., that he was visiting this country and had left his immigration document at the Yacht.—When questioned about the corpse, he declared it to be a man named JAMES A. LYONS, North American national, who was a very good friend of his and also his employer; the the deceased was married to

Jane Lyons, had 3 children, and lived at Smoretroe Ranch, Palm Springs, California, U.S.A.; that he does not know Mr. Lyons' parents but believes that they are alive, and that he, Parrick, met Jane Lyons approximately 10 years ago and have been good friends since.—

Questioned about Mr. James A. Lyons death, he declared the following: "Yesterday, at 7 o'clock in the morning, James, Dr. Homer P. Rush, Antonio Ruiz and his youngest son, and myself, went to the fields with the purpose of hunting doves. Upon our arrival, each one went in different directions, I took Mr. Ruiz' son with me. After a while, we heard two or three shots and shortly, somebody calling for help. We ran to where the voices were coming from and found that Dr. Rush and Antonio Ruiz had arrived first and were trying to take James, who was breathing with difficulty, out of some bushes, We all helped to take him out of the bushes and saw then that he had some excoriations and gun-powder burns on his right cheek and neck. We all tried to help him but nothing could be done, he died almost immediately. We left the body at the same place and I took off my shirt to cover his face in order to protect it from the sun. Mr. Antonio Ruiz C. went to inform the authorities of Cabo San Lucas, and returned after a while with the Sub-Delegate of the Government, who, after taking our declarations, went back to Cabo San Lucas leaving a Policeman to watch over the corpse".—The witness in the act believes that Mr. Lyons' death was accidental, and requests that after the autopsy, the corpse be delivered to the airplane pilot Mr. Henry F. Perci who will take care of the funeral.—This declaration was given by the assistance of the interpreters who translated it into

the spanish language and after being read and approved was signed at the margin before me, Prosecutor, and attesting witnesses.—Robert J. Parrick, signature.—M. Galindo S, signature.—Educrdo Ruiz C, signature.—Alberto Ceseña Dodero, signature.—Jose Prisciliano Ceseña, signature,—Abel Green M, signature.

On the same date, February 11, 1953, the undersigned, Prosecutor of this town and the witnesses, attested the legal autopsy of the corpse of the North American national Mr. James A. Lyons.—We certify.—The Prosecutor, Alberto Ceseña Dodero, signature.—Witness, Jose Prisciliano Cesena C, signature.—Witness, Abel Green M, signature.

Fausto Peralta Bañaga, Sub-Delegate of the Government at Cabo San Lucas of this jurisdiction, who was summoned by this Public Ministry, declared under oath, to be named as it is above state, Mexican nationality, catholic, married, 40 years of age, Federal employee, born at La Playa of this Port, with address at Pablado de Cabo San Lucas.—When questioned about the facts under investigation, he replied:—"Yesterday, around 8 o'clock, Mr. Antonio Ruiz Cassezus came to my office and announced that in the fields near the road to this town was a dead man of North American nationality, who accidentally injured himself with the 12 guage shutgun he carried. I immediately went to the mentioned place and found the corpse and two other North American citizens named Dr. Homer P. Rush and Robert J. Parrick. On the ground, about 3 meters from the corpse, was a shutgun, which I picked up. The two friends of

the deceased informed me that around 7 o'clock, same date, they arrived to such place with the purpose of hunting doves and rabbits, that they were all happy and friendly and the Mr. Lyons' death was accidental.—The foregoing declaration was ratified and signed before me, Prosecutor, and attesting witnesses.—At the margin, with ink, an illegible signature.

February 11, 1953.—In my presence and that of the witnesses, Mr. Antonio Ruiz Cassezus, who was summoned by this Public Ministry, declared under oath, the following:—To be named as it is above stated, 50 years of age, Mexican nationality, catholic, married, merchant, born and addressed at Cabo San Lucas.—Questioned as to the events of February 10, 1953, he declared:—"Yesterday, at 7 o'clock, Dr. Homer P. Rush, Mr. James A. Lyons, and Mr. Robert J. Parrick, invited me to join them with the purpose of hunting doves. We drove in my car and once at the fields each one of the party went in different directions. James A. Lyons and Robert J. Parrick carried 12 gauge shutguns; Dr. Rush and myself, 22 caliber rifles.—About 8 o'clock, I heard two or three shots, and shortly somebody calling for help. I ran to the place where the voice came from and found Dr. Rush trying to carry James out of some bushes. Robert J. Parrick and my son came then; we all tried to help James but nothing could be done. I went then to state the case to the authorities of Cabo San Lucas, and returned latter with the Sub-Delegate of the Government".—The declarer's opinion is that James A. Lyons' death was accidental, and certifies that when they depart, he looked happy and in good health.—After ratify-

ing his declaration, Mr. Ruiz Cassezus signed it before me, Prosecutor, and witnesses whereof.

On February 11, 1953 this Public Ministry received, in duplicate, the Doctor Certificate issued by the physicians Armando Serrano Anaya and Eduardo Rodriguez Cota.—In witness whereof, we have hereonto set our hand.—Jose Prisciliano Ceseña C.—Abel Green M., (signatures).

The witnesses of this Public Ministry put into the hands of the Prosecutor, the Doctor Certificate issued by Dr.Armando Serrano Anaya and Dr. Eduardo Rodriguez Cota, concerning the legal autopsy practiced in the corpse of the North American citizen James A. Lyons.—February 11, 1953.—Jose Prisciliano Ceseña C.—Abel Green M.—signatures.

On the same date, February 11, 1953, the Prosecutor resolved:—To congregate the medical report to the files of this case.—We hereonto certify:—Alberto Ceseña Dodero, Prosecutor.—Jose Prisciliano Ceseña C.—Abel Green M.—Signatures.

In view of the foregoing, hereinto ended the day record of proceedings.—In witness whereof, we have hereonto set our hands and affixed the seal of this Public Ministry.—Alberto Ceseña Dodero, Prosecutor.—Jose Prisciliano Ceseña C, witness.—Abel Green M, witness.—signatures.

DELIVERY OF THE CORPSE.

San Jose del Cabo, B.C., February 12, 1953.—I, Alberto Ceseña Dodero, Prosecutor of this town attested

by witnesses, have given away the corpse of the North American national Mr. James A. Lyons to the airplane pilot Henry F. Perci, who, after receiving it, signes this minute by common consent.—At the margin.—Henry F. Perci, signature.—We attest:—Alberto Ceseña Doder, Prosecutor.—Jose Prisciliano Ceseña C, witness.—Abel Green M, witness. signatures.

San Jose del Cabo, Lower California, February 12, 1953.—The Prosecutor attested by witnesses, resolved:—That inasmuch of the denunciation made by telephone by the Sub-Delegate of the Government at Cabo San Lucas, Mr. Fausto Peralta Banaga, after having found dead in “Los Llands” a man of North American nationality, and according to the Doctor Certificate issued by the Physicians Armando Serrano Anaya and Eduardo Rodriguez Cota, who practiced the legal autopsy on the corpse of that man, who was called JAMES A LYONS, a North American national, and which certificate established that the corpse was examined and that the death was due to an aortic insufficiency which caused a sudden cardiac fatigue, having found also ateromatic plates in the coronaries. In view of the above and prior to the identification of the corpse, and with the transcription of the present resolution, send a communication to the Judge of the Registry of this town, to the effect that a minute be inserted in the book of deaths of this year, for which purpose, description of the deceased are hereby given, according to the identification of the corpse: James A. Lyons, North American national, married, fifty years of age, his wife is Jane Lyons, residence: Smore Tree Ranch, Palm Springs, Calif., U.S.A.—This

transcription, attached to the doctor certificate to be returned, is to be inserted in the correspondent minute.—San Jose del Cabo, B.C., February 12, 1953.—The Prosecutor, Alberto Ceseña Dodero.—signature.

On the same date, February 12, 1953, communication inserting the foregoing resolution was sent to the Judge of the Registry of this town, to be inserted in the book of deaths of this year.—Signed: Alberto Ceseña Dodero, Prosecutor.

PROOFS SIGNED IN DIFFERENT RECEIPTS.

I, Howard W. Irwin, received from Alberto Ceseña Dodero, Prosecutor of this town, a 12 gauge shutgun that belonged to the deceased James A. Lyons, North American citizen, with the purpose of deliver it to his wife Mrs. Jane Lyons.—Signed, Howard W. Irwin.—Address: Portland, Oregon, United States of America.

Received from Mr. Alberto Ceseña Dodero, Prosecutor of this town, \$9.00 (nine dollars), and a small metall clasp-knife with the deceased name on, to be delivered by Mr. Robert J. Parrick to Mrs. Jane Lyons.—Fernando Chacon, illegible signature.—Certified:—Alberto Ceseña Dodero, Jose Prisciliano Ceseña C, Abel Green M,—signatures.

With the foregoing, the day record of proceedings is closed.—In witness whereof, we have hereunto set our hand and affixed the seal of this Public Ministry.—Alberto Ceseña Dodero, Prosecutor.—Jose Prisciliano Ceseña C, witness.—Alberto Green M, witness.—signatures.

—DOCTORS' OPINION—

Having been requested by the Prosecutor of this Town as Auxiliary Legist Doctors, the undersigned, Dr. Armando Serrano A, and Dr. Eduardo Rodriguez C, went, at 10 o'clock February 10, 1953, to "Los Llanos", at Cabo San Lucas, of this jurisdiction, to examine the corpse of a man of North American nationality.—At a distance approximately of one meter from the road, under some bushes, covered with a canvas to protect it from the sun, was a masculine corpse wearing blue trousers, gray sport shirt with short sleeves, gray socks and brown shoes. The body was laying on its right side, from North to South, the head over a sack, the arms outstretched and the legs bent at the knees; rigor mortus had set in, specially around the face and neck.—At 3, 12 and 16 meters South from the corpse, were found 3 shotgun shells.—About 3 meters on the same direction, were 4 dead doves.—There was blood on his face and neck, but none on his body or on the ground.—Having proceeded to examine the corpse, we deducted that the man died four or five hours before.—According to Articles 220 and 221 fractions II and III of the Organic Law of the Court of Justice of the District and Federal Territories, the body was transferred to San Jose del Cabo, B.C., where the legal autopsy was practiced. The report is as follows: "Corpse of a man approximately of 50 or 55 years of age, strong build, white complexion, about 1.85 meters in height, abdominal perimeter 85 centimeters, thorax perimeter 93 centimeters, temperature: cold and rigid.—Cyanosis on the head, neck, thorax and fingernails.—Abundant hair mostly gray, green

eyes, flat nose, black eyebrows, normal size mouth, clean shaved. All dental pieces complete, protossis in the first and second right upper molar teeth. The tongue was pressed between the dental rows. Transversal skin lines on the forehead, neck and nucha.—Gun-powder grains were found incrustrated in the neck, right side of the face, eye-lid and ear. In the right side of the forehead, near the hair line, was found a hole of about 1 millimeter in diameter.—Also were found excoriations in the right arm and hand.—At separating the hair-skin off the skull, was noticed that the hole in the forehead did not reach the bone.—Normal osseous sutures, higher longitudinal sinus with a small liquid black blood, slightly soft brains.—Vertebral, basilar and cerebrine arteries, and hexagon of Willis, no alteration.—The neck vascular nerves were dissected, having found no alterations.—Tongue hard and pressed between the teeth, normal pharinx and larynx, and esophagus and trachea were dissected, having found no alterations.—**THORAX.**—When costal sternon brest plate was lifted, costal chondro ossification was found.—Abundant and strong pleuroparietal adhesions in the posterior face of the sternon and hemithorax.—Congestioned lungs, when cut in sections black liquid blood drained off.—Left lung lobule, superior and inferior functioned.—Encreased pericardium with strong adhesions on the diaphragm.—Heart surrounded by a thick coat of greasy tissues.—Left ventricle slightly hipertrophied, fattened and hardened aortic sigmoides with ateromatic pockets, left auriculoventricular ring slightly exuberated. The coronary arteries were dissected having found ateromatic plates.—**ABDO-**

MEN.—Dark red liver, encreased in weight and size, resistant to sectional cut. Gall-bladder full of dark green bile, in a quantity of approximately 40 c.c., it had also 2 calculus, 1 of 1 cm. and the other of 3mm. in diameter. —Remainder abdominal organs without any pathologic alterations.—CONCLUSIONS: We consider that the death was due to “an aortic insufficiency that probably provoked a sudden cardiac fatigue”.—Secondary injuries connected with the cause of death. —Ateromatic plates in the coronaries (coronary insufficiency), hepatic congestion in the lungs.—Other injuries not related with the cause of death:—Excoriations in the face and neck, gun-powder grain incrustations, bile lithrasis.—Under oath and as to our knowledge and understanding, we, Auxiliary Legist Doctors, per request of the Prosecutor of this town, extend this certificate at Villa de San Jose del Cabo, Southern Territory of the Lower California, Mexico, on February eleventh nineteen fifty three. — THE EXPERT AUXILIARY DOCTORS. — Signed.—Dr. Armando Serrano A.—Dr. Eduardo Rodriguez C.

February 13, 1953.—In view of the foregoing, the day record of proceedings is closed.—Signed, Alberto Ceseña Dodero, Prosecutor.—J. Prisciliano Ceseña, witness.—Abel Green M., witness.

San Jose del Cabo, Lower California, February 14, 1953.—The Prosecutor of this town RESOLVED:—That being under the judgement of this Social Authority to set this case, and inasmuch as the investigation whereof is completed, a final resolution is to be forwarded, ac-

ording to the Law.—The Prosecutor, Alberto Ceseña Doderó, signature.—Witness, Jose Prisciliano Ceseña, signature.—Witness, Abel Green M, signature.

San Jose del Cabo, Lower California, February 15, 1953.—As it has been judged, the prior investigation number 1,3,7,(7)/53 carried out by this Public Ministry in regard with the death of the North American national who was called JAMES A. LYONS, and IN VIEW OF: I.—The denunciation made by telephone on February 10, 1953 by the Sub-Delegate of the Government at Cabo San Lucas of this jurisdiction, Mr. Fausto Peralta Bañaga, after having found dead at “Los Llanos” the so-called North American national; cognizance of the facts by personnel of this OFFICE and physicians Armando Serrano Anaya and Eduardo Rodriguez Cota; investigations made in case of delinquency and minute inserted according to Article 16 of the FEDERAL CONSTITUTION; summoned witnesses Dr. Homer P. Rush, airplane pilot Robert J. Parrick and Antonio Ruiz Cassezus; Doctor Certificate issued by the physicians who practiced the legal autopsy of the corpse, which states that Mr. JAMES A. LYONS death was due to an AORTIC INSSUFFICIENCY THAT PROVOKED A SUDDEN CARDIAC FATIGUE.—II.—According to articles 42 and 43 of the Organic Law of the INSTITUTION, the undersigned, Prosecutor, has RESOLVED: That the case is not subject to delinquency and that no judicial investigation is to be followed.—III.—When this resolution is approved by the General Proctor of Justice of the District and Federal Territories, to whom the judicial proceedings of this case are to be sent to,

this investigation is to be deposited in the files of this Public Ministry.—Resolved and signed by the Prosecutor attested by the witnesses.—Alverto Ceseña Dodero.—Jose Prisciliano Ceseña C.—Alberto Green M.—Signatures.

This is an authentic copy of the original, to be sent to Attorney Jose Bernal Lopez, Prosecutor of the city of La Paz, B.C., as per request in communication number 83, dated February 26, 1953, to be delivered to the GOVERNOR OF THE SOUTHERN TERRITORY, La Paz, Lower California.

San Jose del Cabo, B.C., March 4, 1953.

| | | |
|---------------|------------------------|---------------|
| Witness: | The Prosecutor: | Witness: |
| J. P. Cesena. | Alberto Cesena Dodero. | Abel Green M. |
| (signature) | (signature) | (signature) |

At the margin:—A seal of the Public Ministry at San Jose del Cabo, Lower California.—Mexico.

United States
Court of Appeals
For the Ninth Circuit

UNDERWRITERS AT LLOYD'S, LONDON, ENGLAND,
Appellant,

vs.

JANE S. LYONS,

Appellee.

GLENS FALLS INDEMNITY CO., a corporation,
Appellant,

vs.

JANE S. LYONS,

Appellee.

Brief of Appeller

Appeal from the United States District Court for
the District of Oregon

MAGUIRE, SHIELDS, MORRISON & BAILEY,
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FILED

MAY 20 1957

PAUL P. O'BRIEN, CL

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United States
Court of Appeals
For the Ninth Circuit

UNDERWRITERS AT LLOYD'S, LONDON, ENGLAND,
Appellant,

vs.

JANE S. LYONS,
Appellee.

GLENS FALLS INDEMNITY CO., a corporation,
Appellant,

vs.

JANE S. LYONS,
Appellee.

Brief of Appellee

Appeal from the United States District Court for
the District of Oregon

STATEMENT OF THE CASE

Plaintiff brought these actions to recover on three policies of insurance, payable in the event the insured, her husband, died as a result of accidental injury. The two actions were consolidated for trial, and on appeal.

The insured's death took place while on a vacation trip, fishing and hunting, in Mexico. His companions on the trip were his business partner, and

two thoroughly qualified cardiologists. At the time of his death he was hunting doves with a 12-gauge magnum shotgun.

At a time when the insured was separated from his hunting companions, two shots were heard in rapid succession, followed by a noise of stertorous breathing. Dr. Rush went to see what the trouble was, and found him lying unconscious, with blood and powder burns on his face. The insured was pulseless, and had a tremulous heartbeat. Within a few minutes, he died.

Both Dr. Rush and Dr. Chamberlain, the other physician who was in the party, testified, on the basis of their observation of the insured during the trip, his medical history, and the other relevant evidence, that the cause of his death was the gunshot wound. The pain and emotional reaction of the wound produced anguish and shock, causing the insured's heart to beat ineffectively so as to be incapable of sustaining life.

The sole issue at the trial was the cause of the insured's death, and the record consists almost exclusively of several hundred pages of expert medical testimony. The Honorable Edward P. Murphy, sitting without a jury, found that the insured was a vigorous, robust man of normal health for his age, that his death was not caused or contributed to by disease, but was occasioned solely by accidental,

violent and external means, to wit, the accidental discharge of the shotgun. He awarded to plaintiff a judgment on both policies, with costs and attorneys fees as provided by Oregon law. His memorandum opinion is found at p. 17 of the Glens Falls Record and p. 19 of the Lloyd's Record. It is published at 145 F. Supp. 877.

The sole issue presented upon this appeal is the sufficiency of the evidence to support the factual findings and legal conclusions of the trial judge.

STATEMENT OF FACTS

The only issue presented by this appeal is factual. Since the appellant's brief presents a rather incomplete, fragmentary and selective portion of the great mass of expert medical testimony which was introduced at the trial, it is necessary for appellee to state the facts of the case in considerable detail.

The Medical History of the Insured

At the time of Mr. Lyons' death, he was 49 years of age (R. 87). He was a successful executive in the lumber industry. The evidence revealed that he was an extremely dynamic, forceful and vigorous individual. He was an outdoor man, and used to considerable exertion (R. 53-56, 83-84, 89-91, 152, 204-205).

His family physician was Dr. McKeown, of Coos Bay, Oregon, a general practitioner (R. 195). Dur-

ing the course of his relationship with the insured, he conducted several heart examinations, which revealed that insured's heart was normal (R. 170). On one occasion, in 1950, because the insured had chest pains radiating down his arms, Dr. McKeown subjected the insured to all the tests for heart disease, and found his heart to be normal (R. 196-197). The doctor diagnosed the pains as intercostal neuralgia and anxiety tension (R. 198).

On February 3, 1953, one week before his death, Mr. Lyons returned to Palm Springs, California, from an extensive business trip (R. 56-58). On the night he arrived home, he had pain in his chest (R. 135), although as far as his wife knew, he slept through the night (R. 134).

The following day, Mr. Lyons consulted Dr. McBride, of Palm Springs, a specialist in internal medicine (Ex. 2, p. 8), whose deposition was introduced in evidence as Exhibit 2 (R. 85). Dr. McBride gave him a thorough cardiac examination, including exercise tolerance trials, and found them all to be within normal limits (Ex. 2, p. 4). The doctor diagnosed the pains as cardiac fatigue, due to excessive emotional stress on the business trip (Ex. 2, p. 4). He advised the insured that it would be all right to go on his contemplated fishing trip, but not to do any excessive work (Ex. 2, p. 4), because

the doctor was interested in the insured's getting some rest (Ex. 2, p. 8). The doctor's office notes indicate that he prescribed nitroglycerin if Mr. Lyons had pain (Ex. 18, R. 135). There is no evidence that Mr. Lyons ever took nitroglycerin.

The Condition of the Insured on the Fishing Trip

Insured was the guest of Mr. Irwin, a business associate, on the boat upon which the party went fishing (R. 170). The other two guests, Dr. Rush and Dr. Chamberlain, had both acted as Mr. Irwin's physician (R. 147, 170). Neither had ever met the insured prior to this trip (R. 147, 170). Both Dr. Rush and Dr. Chamberlain were cardiologists, and were eminently qualified in that field (R. 142-144, 168-170).

The parties met at San Diego, and flew down to La Paz, Mexico, by private plane, at an elevation of 7,000 feet. Mr. Lyons showed no signs of illness, shortness of breath or distress at that elevation (R. 147-148, 171).

The parties boarded the fishing boat that night, and fished unsuccessfully the next day (R. 149). The following day, a large marlin was hooked, and Mr. Lyons played it for half an hour until the line parted. This involved considerable exertion and hard work (R. 149-151, 176-177). He exhibited no signs of distress as a result of this exertion. The rest of the day was spent fishing, and shooting ducks, at

which the insured was steady and successful (R. 179).

During the course of the trip, the insured showed no signs of ill health, did his share of the lifting and loading involved, and ate normally (R. 173-174).

The Death of the Insured

The following morning, the party, except for Mr. Irwin, arose early and went on a dove hunting expedition near the village of San Lucas (R. 178). While they were waiting for the doves, they hiked around the country, including a climb up a sand dune 80 to 100 feet high (R. 157, 181). Mr. Lyons showed no signs of distress or discomfort (R. 157). In fact, he commented that it was nice to be alive on such a beautiful morning (R. 179).

The gun which Mr. Lyons was carrying was a Winchester 12 gauge magnum shotgun (Ex. 1), using magnum shells. These are considerably larger than ordinary shotgun shells and explode with considerably more force (R. 69, 166, 180).

When the doves finally began to come over, Dr. Chamberlain had wandered away (R. 157-158), and Dr. Rush was some yards from Mr. Lyons and unable to see him because he had his back turned and because there was brush between them (R. 181-183).

Dr. Rush heard shots, and saw a dove fall each time, until one occasion when he heard the shotgun go off twice in rapid succession. On this occasion, no dove fell after the second shot (R. 183). Some ten to twenty seconds later (R. 210), Dr. Rush heard a stertorous type of breathing, which he thought might be the snorting of some kind of wild animal, coming from the direction of Mr. Lyons. He walked over to investigate (R. 183-184). Mr. Lyons was lying on the ground on his face, under a mesquite bush, within thirty yards of where the doctor had left him (R. 184, 181). He was lying on his shotgun (R. 185). Blood was coming from the right side of his face (R. 186).

Other members of the party arrived and helped to roll Mr. Lyons over and attempt artificial respiration (R. 186). After a minute or two, frothy sputum, which gradually became blood tinged, began to come out of his mouth and nose. He was pulseless, and had no rhythmic heart beat, although there was a tremulous sensation in his chest like the purring of a cat (R. 187-188). He was cyanotic and unconscious (R. 188). He was cold and clammy (R. 375), an indication of medical shock (R. 327). There were powder burns and scratches on his face and neck, and Dr. Rush felt a pellet under the skin (R. 188-189). After five to seven minutes, Mr. Lyons expired. Artificial respiration was unsuccessfully attempted (R. 188).

An autopsy was performed upon the body of the insured by two young Mexican physicians (R. 264, Ex. 12, Ex. 15), at which Drs. Chamberlain and Rush, despite their express desire to be present, were not permitted to attend (R. 161, 192-193). The autopsy report is in evidence (Ex. 12). Exhibit 15 is a translation (R. 109) made by Dr. Christen, a Mexican pathologist associated with Dr. Lehman in Portland (R. 99).

The following findings of the autopsy were considered significant by the experts who testified at the trial. The lungs were found to be congested. The liver was very enlarged in weight and volume. The left ventricle was slightly hypertrophied. The aortic semilunar valves were thickened and hardened with atheromatous deposits, and the mitral valve was slightly dilated. The coronary arteries were diminished in caliber due to the presence of atheromatous plaques.

The autopsy surgeons concluded that the cause of death was "aortic insufficiency that probably brought about the acute cardiac failure. Secondary lesions related to the cause of death. Coronary atheromatous plaques (coronary insufficiency), pulmonary congestion and hepatomegalia."

Subsequently, one of counsel for defendants examined the autopsy surgeons ex parte, a translation of said examination appearing at pages 2 and 3 of

Exhibit 14. The autopsy surgeons stated that they found no evidence of an antemortem clot or a pulmonary embolus. They were unable to answer a question asked them regarding the extent of the diminishment of the coronary arteries.

SUMMARY OF ARGUMENT

Plaintiff had the burden of proving that the insured's death was caused by accidental bodily injuries, and that it was not contributed to by disease. The burden was met by the evidence of two distinguished cardiologists who testified that the cause of the insured's death was a gunshot wound. Their testimony was based, not upon speculation and conjecture, but upon their own personal observation of the insured over a period of two days, and under severe exertion, the autopsy findings, the personal and medical history of the insured, and the personal observation of one of them of the manner in which insured died.

Although there was no direct testimony that the gunshot wound preceded the fatal incident, this does not mean that the determination of the fact by the court was based upon speculation and conjecture. The evidence showed that the insured had a normal heart, and under all the circumstances of the case, the most probable and only logical cause of his death was a combination of cardiac arrhythmia and shock, caused by the explosion of the shotgun in his face,

developing into ventricular fibrillation and producing death.

The argument that the insured's death was contributed to by disease is not tenable because, under the Oregon authorities, an insurance company must take the risk of a condition which is normal for the age of the insured, and the evidence in this case is that the insured's heart was normal for his age. Hence, even though the court found insured's heart to be "less than perfect," the deviations from perfection on an absolute standard would not be considered a "disease" within the meaning of the policy under Oregon law.

ARGUMENT

In order to recover in these cases, the plaintiff had the burden of proving that her husband's death resulted from accidental bodily injuries which, solely and independently of all other causes, occasioned his death, and that his death was not directly or indirectly caused or contributed to by disease or natural causes. Plaintiff met this burden by presenting the testimony of two eminent and qualified cardiologists that in their opinion the cause of the death of the insured was a gunshot wound, which produced pain, anguish and shock, causing the insured's heart to develop an unusual, abnormal rhythm, which in turn caused a functional coronary insufficiency and his death.

This testimony was not based merely upon hypothetical facts and the general experience of the doctors in the field of cardiology. It was founded upon their personal observation of the insured at close quarters over a period of two days; at a high altitude, under extremely heavy exertion, at meals and at rest. It was based upon the findings of one of the doctors who was with the insured at the very moment of his death. It was based upon a thorough and comprehensive cardiac examination of the insured made less than a week before his death, with normal findings, the electrocardiograph chart of which the doctors personally examined. It was also based on the insured's personal and medical history.

Certainly the foregoing background of information furnishes as adequate a foundation and basis for the medical opinions as to the cause of Mr. Lyons' death as one could possibly get in a case of this kind. The opinions of the doctors were not based, as appellants assert, upon speculation and conjecture, but upon personal observation and long experience in the field of cardiology.

Appellants would have this Court speculate and conjecture about the adequacy of the foundation for the medical opinions of these qualified expert witnesses, and substitute its own opinion for theirs, based upon the fact that the doctors in their testimony occasionally used such language as "I think," "it is my belief," or "I must assume."

This captious and picayune quibbling over details of terminology could conceivably be justified with respect to certain types of evidence, but in this case it entirely ignores a record in which every phase of the opinion of these two doctors was thoroughly searched into and examined for hundreds of pages of testimony.

The doctors made extremely clear to the trial judge what their opinions were, and what the bases of those opinions were. It is true that they could not state those opinions with absolute certainty, but this is not required by law or logic. To characterize the medical opinions in this of all cases as being based upon mere speculation and conjecture is so far-fetched as to be frivolous.

The Testimony Regarding the Cause of Death

Both Doctors Rush and Chamberlain testified unequivocally that the cause of the death of the insured was the gunshot wound (R. 227-228, 364, 375-377). It is true that no one was with Mr. Lyons at the moment of the commencement of the fatal incident, and hence there is no direct evidence that the shotgun blast preceded the fatal ventricular arrhythmia. To conclude from this fact that the doctors necessarily "assumed" that the shotgun blast preceded the heart failure and caused it, however, is to ignore the major portion of their testimony. The doctors were fully examined regarding all other possibili-

ties which might have caused the death of the insured. Their conclusion was arrived at by a process of elimination. They were familiar, from personal observation, with the manner in which Mr. Lyons did die, and on the basis of their experience knew what factors could cause death in that manner. They were unable to account for what they knew to have occurred on any basis but the necessary conclusion that the shotgun blast preceded and initiated the chain of events which followed.

As Dr. Rush stated, in explaining his answer as to the cause of death (R. 376-377):

“And I think that we had involved in it—this was a rather unusual type of sudden death—inasmuch as it involved all four factors that we commonly find responsible for sudden death. They all seemed to be a part in this picture to me. That is the reflex phenomena that could produce shock and heart arrhythmia, passive congestion which the autopsy findings stated were present, the arrhythmia which I felt myself had to be present with the findings that I found when I was there. Yet, I know it could not have been only arrhythmia because he lived too long, and he couldn’t have developed the pulmonary edema and passive congestion had he died from just the arrhythmia. There would not have been the time element. I further believe that this is a rather unusual type of case and I can only draw the conclusions that the primary thing must have been the ventricular arrhythmia, because in

sudden death that is caused by any strong emotional factor regardless of what it is. It's felt that ventricular arrhythmia and primarily fibrillation was also the cause of death, but we know that particularly now, myocardial infarction is responsible for it, but this man had an autopsy which showed that he did not have a myocardial infarction. So I then must assume that it was some strong emotional factor that initiated it, because the other factors were not there."

Similarly, Dr. Chamberlain, when asked to assume that the injuries occurred after the onset of the heart failure, stated that he did not think the autopsy findings justified any such assumption (R. 311-312).

Certainly, the able trial court was fully aware of the fact that there was no direct evidence regarding the time element, and was not confused into believing that the doctors had "assumed" the very fact in issue (R. 268). The court permitted plaintiff to prove that the medical cause of death was the shotgun blast (R. 227-228, 364, 375-377), but refused to permit the plaintiff to prove further that on the basis of the medical evidence the shotgun blast must necessarily have preceded the chain of events which led to the insured's death (R. 256, 377-379).

It is obvious from the record that the court felt that it was for him to draw the conclusion regarding the time sequence based upon all of the evidence in

the case, and his complete understanding of the issue now raised by appellants is illustrated by the colloquy which took place when plaintiff offered to prove affirmatively by the testimony of Dr. Rush that the shotgun blast must have preceded the fatal heart incident (R. 403-404):

“Mr. Beebe: May the Court please, the plaintiff respectfully offers to prove as follows: The witness would be asked to assume the same facts which he has been assuming in his testimony in this case, and he would be asked to state whether he has any opinion as to whether there were any outside or any external forces other than the last shotgun blast which he heard, which could probably have initiated the fatal heart incident of February 10, 1953. If permitted to answer the witness would say that he has an opinion, and if asked what that opinion was, he would testify that in his opinion there was no other incident, other than the last shotgun blast that he heard which likely or probably initiated the fatal heart incident of February 10, 1953.

The Court: Well, counsel, it occurs to me that that matter has been adequately covered by the Doctor.

Mr. Beebe: I think it has been covered by a process of elimination, it has, and now in our effort to make a full presentation, we simply want to present it in the positive form, and we are making our offer of proof for the record.

The Court: I think I am afraid of that question, counsel, I think I would be afraid for the

record, too. I think that it has been adequately covered by a process, as you have suggested, of elimination, possibly by sort of a negative approach, but I think I have a complete understanding of the Doctor's reasons for that, and the offer of proof will be denied.

Mr. Beebe: As a matter of fact, your Honor, under the circumstances, the plaintiff will withdraw her offer of proof."

Medical Terms

In order to comprehend the reasoning process by which the doctors arrived at the conclusion that the shotgun wound must have been the cause of death, an understanding of some of the medical terms involved in the case is necessary. Without attempting to go too deeply into medical science, plaintiff wishes to set forth a brief discussion of some of the subjects which were considered in the medical testimony.

Atherosclerosis is a form of arteriosclerosis or a hardening of the arteries. To the extent of its presence, it reduces the caliber of the artery. It is the exception to find a man of the insured's age who would not have some atheromatous plaques in the aorta or coronary arteries (R. 119-120, 269, 405).

Aortic insufficiency refers to an incompetence of the semilunar valves of the aorta (R. 346-347). It is generally caused by syphilitic or rheumatic heart disease (R. 224). It can be caused by arteriosclerosis,

but only in the presence of sustained hypertension of a moderate or severe degree (R. 239). In any event, that is a type of aortic insufficiency which would not produce a severe burden on the heart (R. 240). It was established beyond cavil that the insured did not have aortic insufficiency (R. 19, 223-224, 238-239, 240-241, 247-249, 252-253, 262-264, 314-315, 320, 346).

Coronary insufficiency is an impairment of the blood supply of the heart to the extent that it is unable to work properly (R. 267). An organic coronary insufficiency is caused by occlusion or blocking of the coronary arteries. At least two and generally three major branches of the coronary blood supply must be closed before a witness has coronary insufficiency (R. 236, 267, 272). If the insured had had a chronic coronary insufficiency, the autopsy would have shown degenerative change or fibrosis, showing that the heart had been poorly nourished from coronary insufficiency (R. 410). It would also have had to show, as above indicated, some blockage of the coronary arteries by a clot, embolus, infarction, or occlusion.

In the absence of autopsy findings which would establish the existence of organic coronary insufficiency, a competent cardiologist can determine the existence of the disease by observing the individual under exercise and this can be a more important

method of diagnosis than the physical findings (R. 268, 500).

The other type of organic insufficiency is functional, which can occur in the complete absence of any coronary disease (R. 317, 323). Anything that would prevent enough blood from going through the coronary artery to take care of the nourishment of the heart muscle would cause coronary insufficiency (R. 401), and this could be caused not only by blockage of the arteries themselves but by some interference in the blood supply, such as hemorrhage, shock or an ineffective heart beat (arrhythmia) (R. 234, 243, 290-291).

Angina pectoris is not a disease, but is a symptom associated with coronary insufficiency (R. 286). Angina is the pain of coronary heart disease, and generally comes on during the peak of exertion, excitement or emotion (R. 219).

Ventricular tachycardia is a form of heart arrhythmia involving a pulse of around 220 (R. 340). It is not incompatible with life unless it changes over to one of the other irregular rhythms, which it is very apt to do (R. 339). A heart rate from 260 to 300 is called ventricular flutter or rapid tachycardia (R. 291, 337). This condition will cause the pain symptoms of coronary insufficiency, due to a deficient blood supply on a functional basis (R. 277, 307, 317, 340-341). If the rate goes faster than

300, it is called ventricular fibrillation (R. 337). Neither ventricular flutter nor ventricular fibrillation are compatible with life if they continue long enough, because the heart beat is not capable of circulating the blood (R. 341).

The various arrhythmias can be caused by anything which stimulates the nervous system (R. 287) such as fright, shock, or pain (R. 287, 303-304). The symptoms are that the patient first gets a sensation of weakness, and in a matter of three to five seconds develops a cold, clammy pallor or cyanosis. If it continues, the patient becomes unconscious. By this time, stertorous breathing will develop, and the patient dies of cerebral anoxia (R. 341-342). A purring sensation felt in the chest of an unconscious patient is an objective finding of ventricular flutter or fibrillation (R. 229-230, 292, 407).

Medical shock is a mechanism which is not well understood (R. 242), but its effect on the heart is caused by the fact that the blood tends to pool in reservoirs in the venous system and the blood pressure drops strikingly (R. 242-243). This causes undernourishment of the heart muscle (R. 250). Shock is a predisposing factor to ventricular fibrillation (R. 289). Among the common causes of shock are injury and strong emotion such as fright (R. 328-329). Thus, shock results in the heart getting too little blood supply by reason of the pooling of the blood and the consequent lowering of the blood

pressure, at the precise time it needs more by reason of adrenalin pouring out of the adrenal glands, causing a wasting of the oxygen which is already in the heart (R. 254).

With this background it is perhaps somewhat easier to understand and explain the mechanism by which the doctors believed the shotgun wound caused the death of Mr. Lyons, and their reasons for believing that to be the most probable cause of the ventricular fibrillation which developed.

The Mechanism by Which the Shotgun Wound Caused Death

For a variety of reasons, based upon their own observation of the insured, his medical history, and the autopsy findings, the doctors concluded that the insured was not suffering either from aortic insufficiency or organic coronary insufficiency prior to his death. As Dr. Rush stated, he had to assume that something started the chain of events leading to Mr. Lyons' death (R. 372). Shock was a part of the situation, because the insured was pulseless, cold and clammy (R. 375). He had a disturbed heart rhythm, which Dr. Rush could feel in his chest (R. 375-376). That, however, was not the sole cause of the death because he would not have lived long enough to have developed the pulmonary edema and passive congestion had he died from just the arrhythmia (R. 377). The shock and arrhythmia were

probably caused by the same external cause (R. 427). As previously described, arrhythmia failed to produce circulation and caused passive congestion and damage to the blood vessels, the shock caused the blood to pool in reservoirs in the venous system, and at the same time it caused a wasting of the oxygen in the heart muscle which aggravated the arrhythmia so the process became irreversible and resulted in ventricular flutter, fibrillation and death (R. 228-232, 242-243, 254-255, 291-295, 375-377, 394-395, 406-408, 409-410).

The Appellants' "Equally Probable Causes"

The process of elimination by which the doctors arrived at their conclusions can perhaps be best explained by a discussion of the various so-called "equally probable causes" offered by the defendants as an explanation for the death of the insured. Thus, the first possibility, that the insured might have suffered a sudden, fatal heart attack notwithstanding his negative case history and normal cardiac tests was rejected by the doctors for a number of reasons. (It should be noted, in this connection, that the defendants in their Brief fail to specify the type of "fatal heart attack" to which they now refer. Presumably they mean a sudden heart failure or heart standstill.) Dr. Chamberlain stated (R. 230):

"Now, a man whose heart suddenly stops does not develop manifestations of congestive heart failure in a half minute."

Similarly, he further stated (R. 257):

“The answer is that I believe as I stated before that sudden death, that sudden standstill of a heart, for example, doesn’t result in evidence of congestion in the liver. Sudden standstill does not result in evidence of congestion of the liver or evidence of congestion in the lungs such as was described here. That sort of thing takes minutes of life and blood flow for a period of at least a few minutes.”

Dr. Chamberlain further testified that hardly any patients who have a cardiac standstill develop an abnormal heart rhythm (R. 292). The abnormal rhythm and the congestion of the lungs (pulmonary edema) were both observed directly and personally by Dr. Rush (R. 187). The autopsy findings confirmed the existence of lung congestion and added the further fact of congestion of the liver. It was therefore apparent to the doctors, on the basis of what Dr. Rush had observed and felt at the time of death, that this was not a case of a sudden cardiac standstill.

If by “fatal heart attack” defendants refer to some other type of seizure, it could not have been a coronary thrombosis, because there was no clot or embolus found by the autopsy surgeons (Ex. 14), nor did they find a miocardial infarction. There was no finding of fibrosis (R. 410). It was clearly not a case of aortic insufficiency (R. 223-224, 238-239,

240-241, 247-249, 262, 314-315, 320), which was the erroneous conclusion drawn by the autopsy surgeons from the physical findings they made, nor was there any organic coronary insufficiency (R. 235, 236-237, 267, 271-272, 285-286).

The second suggestion made by defendants is that the "derangement within the heart" found by the autopsy surgeons might have precipitated the fatal heart attack. The only findings made by the autopsy surgeons which might justify this description were the presence of atheromatous plaques and the diminishment of caliber of the coronary arteries. The doctors testified that the insured's heart was normal for his age (R. 251-253, 269-270, 357-358), that the presence of atheromatic plaques was not a serious finding in the absence of any heart murmur (R. 213), and that they played no part in connection with the death of the insured (R. 256). The diminishment of the coronary arteries is also not a serious finding in the absence of an occlusion of several of the major branches of the coronary arterial system (R. 236, 267, 271-272), and there was no such finding. Moreover, the pain of coronary heart disease comes on at the peak of exertion (R. 219). Aside from the autopsy findings, Dr. Rush testified that the personal observation he made of the insured under the most severe kind of exertion would be an extremely important factor in reaching his conclusions (R. 500), perhaps more important

than the autopsy findings in any event. The so-called "derangement" within the heart of the insured revealed by the autopsy was such as would most probably have been found in any man of his age (R. 269), and it would have been exceptional if such findings had not been made (R. 119-120).

The third "equally probable cause" is that the insured's chest pains of February 3 were attacks of angina pectoris. The insured had a thorough cardiac examination by a specialist in internal medicine for the sole and precise purpose of determining the cause of the insured's pains at that time. All of the tests were normal, and the pains were diagnosed as heart fatigue. Surely the considered conclusion of a competent specialist engaged in trying to determine the precise question of the cause of the chest pains of that date is a reasonable basis for the conclusion that they were what he said they were and not something else. The reasons Mr. Lyons did not have angina are also discussed in the following paragraph.

The fourth possibility mentioned is that an attack of angina pectoris could have precipitated the fatal heart attack. Dr. Chamberlain definitely testified that "the evidence is strongly against the fact that he could have had" (R. 285). The record establishes that angina pectoris is not a disease itself, but is the symptom of coronary heart disease (R. 219, 285),

also known as coronary insufficiency (R. 286). There can be no coronary insufficiency without the occlusion of several branches of the coronary artery (R. 236, 267, 271-272). Moreover, angina comes on at the peak of exertion (R. 219), not thirty or forty minutes later (R. 285-286, 485), and there is no reason to suppose that the insured, who had battled a large marlin for thirty minutes the day before, and had climbed an 80 to 100 foot sand dune more than half an hour before without visible signs of discomfort (R. 157, 179, 485), should suddenly develop angina pectoris pains while moving approximately thirty yards (R. 181), in the course of shooting several doves. If two experienced cardiologists can state, on the basis of their personal observation of Mr. Lyons under severe exertion, that he did not have coronary insufficiency, there is certainly no reason why this Court should hold that the trial court had no right to accept that conclusion.

Defendants' fifth speculation about "equally probable causes" is that the insured might have been engaged in exertion which precipitated the heart attack during the few minutes that he was separated from Dr. Rush. In the first place, he was found only thirty yards from the place where Dr. Rush left him, and had been shooting doves with some regularity in the interim (R. 181-184). It is a reasonable assumption that a hunter waiting for birds to come over would not have been engaged in any more

activity than was necessary. Moreover, as just stated, Drs. Chamberlain and Rush had observed the insured under the most strenuous type of exertion in playing a marlin on the previous day, and under quite substantial exertion in climbing a sand dune shortly before, with no ill effects. They concluded from their own observations that it was not exertion which precipitated the fatal ventricular fibrillation (R. 285-286, 391-392).

The sixth conjecture made by the defendants is that a viscus reflex from a gall bladder attack might have precipitated the fatal incident. Dr. Rush (R. 446-448, 449), and two of defendants' witnesses (R. 566, 634), all testified that the gallstone found upon autopsy could not have passed through the cystic duct without evidence of tearing and trauma observable on autopsy. No such finding was made. Dr. Rush was of the opinion that the gallstone had passed through the duct long before, when it was smaller, because a stone of that size could probably not have passed through the duct at all (R. 446-447). Both Drs. Rush and Chamberlain were of the opinion that the gallstones had nothing to do with the insured's death (R. 258-259, 395).

The seventh "equally probable cause" appears to answer itself. Drs. Rush and Chamberlain were of the opinion that a coronary occlusion or myocardial infarction did not occur in this case because

there was no evidence that it did occur. It is a little difficult to see what more can be said in this regard. The same reasoning would apply to almost any physical condition which the ingenuity of defendants' counsel might dream up at this stage of the proceedings. The doctors testified as to what, in their opinion, caused the death of the insured. It would be absurd to require them also to testify as to their personal knowledge of the absence of each and every other conceivable possibility, when there was no evidence to support the existence of such possibilities. Moreover, the autopsy report did not show either of these conditions.

The eighth "cause" is that possibly something else precipitated the cardiac arrhythmia. The doctors testified as to the accepted causes of such condition, and gave their reasons for eliminating causes other than some external factor producing a pain, shock, anguish reflex (R. 227-331, 376-377).

Incidentally, defendants once again use the phrase "superficial pain" for which counsel was corrected during the course of the trial (R. 439). The evidence is that the *injuries* were superficial and that superficial injuries are very painful (R. 303-304). There is nothing in the record to justify the statement that the *pain* was superficial.

Each of the suggested "causes," therefore, are shown to have been considered, discussed and re-

jected. The Court was required to arrive at an opinion regarding the most probable cause of Mr. Lyons' death, and the foregoing discussion illustrates the ample reasons he had for refusing to accept the "causes" now proffered by appellants.

Appellants' Other Arguments

It is not our intention to follow appellants down every legal and factual blind alley in their argument. Nevertheless, some of the more egregious misstatements should be noted. Thus, at p. 35 it is stated that Dr. Rush and Dr. Chamberlain concluded that the autopsy surgeons were incompetent to determine the cause of death. Apparently appellants' attorneys have likewise reached that conclusion, as aortic insufficiency, which the autopsy surgeons concluded to be the probable cause of death, is significantly missing from their list of "equally probable causes." There are a number of reasons why Mr. Lyons could not have had aortic insufficiency (R. 121-122, 123, 223-224, 239, 247-248, 262), but suffice it to say that Drs. Rush and Chamberlain both testified that they could have diagnosed aortic insufficiency at sight because of a leaping pulsation of the neck vessels which would be more noticeable if a man were under exertion as Mr. Lyons was while playing the marlin (R. 238-239, 319-320, 444).

Defendants then go on to state that plaintiff must accept the "corollary premise" that there is no com-

petent evidence that any of the conditions not found by the autopsy did not exist. This does not follow at all. Because the autopsy surgeons drew an erroneous conclusion from the conditions they found to exist as to the cause of death does not indicate in any way that other conditions which they did not find to exist were present. The court could very well find, and undoubtedly did, that while the Mexican surgeons were competent to perform an autopsy and describe what they saw, they were not sufficiently qualified cardiologists or pathologists to draw the correct conclusions from what they found. Drs. Rush and Chamberlain, on the other hand, were eminently qualified cardiologists, fully capable of drawing the correct conclusions from all the evidence including that which the autopsy did reveal and failed to reveal (R. 265, 268, 500).

With respect to the question of chest pains, at pages 35 and 36 of their Brief the defendants rely upon the notes of Dr. McBride and the fact that he cautioned Mr. Lyons against "tramping around fields," but ignore the testimony of Dr. McBride that he found Mr. Lyons' heart to be normal and diagnosed his pains as resulting from heart fatigue due to emotional stress (Ex. 2, p. 4). They further ignore the fact that Dr. McBride's caution against "tramping around fields" was based upon the fact that he wanted Mr. Lyons to get as much rest as pos-

sible (Ex. 2, p. 8), and not upon fear of the consequences.

Moreover, Dr. Chamberlain testified that most patients who come to a heart specialist have no heart disease, and that the pains in their chest are generally fatigue (R. 145-146, 237). In fact, despite the statement by the defendants that "constricting chest and arm radiation pains are to considered 'angina pectoris'," the evidence is that (R. 145):

"Awareness of the beating of the heart, irregularity of the pulse, *and especially pain in the chest very often radiating down the arms, which come on as a pattern effect.* In other words, many of the people we see, when they get tired, they have a chest ache that is commonly thought of as part of fatigue, and the person will get an ache, and they think that it is heart trouble and so they get a chest ache." (Emphasis supplied).

Dr. Chamberlain testified that such pains are considered angina until proven otherwise, not because that is the commonest cause, but because it is so serious (R. 284).

Far from the fact being that "Dr. McBride's record affirmatively establishes as a fact the chest pains resulted from attacks of angina pectoris," as stated by defendant, the *testimony* of Dr. McBride affirmatively establishes precisely the contrary.

With respect to the subject of exertion, Drs. Rush and Chamberlain are stated to speculate as to the exertion expended by the insured prior to his fatal heart attack. Certainly the court might appropriately conclude that the exertion expended by the insured in moving thirty yards while shooting four doves was not comparable to the exertion of playing a 200-lb. marlin for half an hour or climbing a 100-ft. sand dune. The doctors reached the medical conclusion that the insured did not suffer a heart attack as a result of exertion, because they had had an excellent opportunity to observe his reactions under violent exertion.

Appellants state that Dr. Chamberlain's testimony to the effect "that an abnormal rhythm is more apt to develop in the heart as a result of some underlying disease (R. 229) and an emotional factor would not precipitate coronary insufficiency unless there was something else physically which intervened (R. 274-275), infers (sic) a diseased condition existed in the insured's heart." It is not surprising that appellants desire to draw this inference. The trial court, however, did not do so, and his conclusion is amply supported by the competent testimony of qualified witnesses to the effect that Mr. Lyons' heart was normal (R. 252-253, 269, 278, 343, 357-358). These medical witnesses based their conclusions not only on the autopsy report, but on their personal observation of the insured under heavy

exertion. Moreover, the doctor who less than a week before insured's death had performed a thorough cardiac examination also concluded that Mr. Lyons' heart was normal (Ex. 2, p. 4). Appellants have throughout these proceedings demonstrated a willingness to infer from the fact that the insured's death involved heart failure, that there was something else wrong with his heart before that moment. On the basis, however, of substantial evidence, the trial court rejected this conclusion, determined that the heart of the insured was normal, and that the gunshot wound caused a reaction which culminated in an ineffective beating of the heart and death.

Defendants' Authorities

The authorities cited by defendant all arise out of varying factual situations with respect to the sufficiency of the evidence to support the facts required to be proved. None of them even remotely resemble the instant situation with respect to either the quantity or quality of medical evidence, and there does not seem to be any point in discussing all of them. The case of *McKay v. State Industrial Accident Commission*, 161 Or 191, 87 P2d 202 (1939), however, is worthy of attention because it discusses the Oregon rule relating to the basing of an inference upon an inference. In their lengthy quotation from the *McKay* case the defendants significantly omit the following passage with respect to

the rule:

“We will not extend this opinion unduly by analyzing these and like decisions, but we are confident that even the critics of the doctrine would not question the soundness of the results arrived at in these cases, although they might prefer a different *ratio decidendi*. The purpose of the rule is not to inhibit our inveterate reasoning processes; it is merely a means of testing logically the relevancy or sufficiency of evidence to prove a fact in dispute. It does not forbid judgments based on circumstantial evidence, for, as Mr. Justice McBride said in *State v. Clark*, 99 Or. 628, 666, 196 P 360:

‘One fact may give rise to a single inference, or it may give rise to several inferences, or a logical conclusion may be drawn from a multitude of detached circumstances so related to each other and to the fact to be proved that it would be illogical to assume that they could all exist coincidentally and the fact in dispute be nonexistent’.”

In the *McKay* case, there was evidence that McKay suffered an electric shock, and that while driving home some time later his car suddenly veered off the road, causing a head wound sufficient to cause death. There was no evidence whatsoever of an injury to the heart. It was impossible in that case to arrive at the conclusion that the deceased had had a heart fibrillation except from the fact that he had died, whereas in the instant case Dr. Rush personally

felt the fibrillation caused by the gunshot wound, and the autopsy findings of lung and liver congestion confirmed its existence.

The defendant suggests, citing *Lippold v. Kidd*, 126 Or 160, 269 P 210 (1928) that:

“Difficulty in establishing a fact should not prompt the court to dispense with proof and impose a liability upon one who did not inflict the injury.”

We certainly have no quarrel with this conclusion. On the other hand, the difficulty of proof certainly affects the amount of evidence necessary to constitute a preponderance, once the fact in question has been satisfactorily established. After all, as the Oregon Court pointed out in *Mt. Emily Timber Co. v. Oregon-Washington R. & N. Co.*, 82 Or 185, 201, 161 P 398 (1916), “The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. * * *” The mechanism of death which the doctors described was admittedly an unusual one. On the basis of all of the facts before them, including their own personal observation of the insured, they concluded that it was nevertheless the most probable cause of his death. The trial court accepted this conclusion as it had every right to do.

Relevant Oregon Cases

In discussing the lengthy collection of Oregon authorities which they cite, defendants significantly omit to mention the two cases decided by the Supreme Court of Oregon within the last year dealing with policy provisions similar to those in question. Both of those cases are in point, and the rule laid down in those opinions goes considerably further than would be necessary to sustain the decision of the trial court here.

In both *Todd v. Occidental Life Ins. Co.*, 62 Or. Adv. Sh. 675, 295 P2d 870 (1956), withdrawn on rehearing 63 Or. Adv. Sh. 333, 303 P2d 492 (1956), and *LaBarge v. United Ins. Co.*, 63 Or. Adv. Sh. 345, 303 P2d 498 (1956), confirmed on rehearing 64 Or. Adv. Sh. 81, 306 P2d 380 (1957), the insured was suffering from a condition which, to use the language of the trial court's opinion here (Glens Falls R. 18; Lloyd's R. 20) was: "less than perfect when measured by a standard of perfection."

In both cases, the insured had osteoarthritis which was not a disabling condition prior to his accidental injury, and in both cases the combination of the injury and the arthritis caused the insured to be disabled. In the *Todd* case, there was the further factor that the evidence showed that the amount of arthritis which the insured had was normal for his age.

In the first *Todd* opinion, the court held that since the disability would not have existed without the concurrence of the arthritis, the arthritis was a concurring cause thereof, and hence the insured could not recover under his policy. On rehearing, however, this conclusion was withdrawn and the court stated that: "it seems only logical that it [i.e. the insurance company] accepts the risks of infirmity which are generally considered normal to mankind at the various stages of life, and, therefore, that osteoarthritis, which in common parlance may be considered normal from that which would be considered abnormal, cannot be considered a concurring cause of disability."

On the same day, the court handed down its decision affirming a judgment for the insured in the *LaBarge* case and saying:

"Plaintiff LaBarge has been disabled by rheumatoid arthritis, which, but for the accidental injury, would not have impaired his ability to work in any manner. In the light of such facts, the determination of the jury that the arthritic condition was not an 'other cause' of the disability will not be disturbed." (Citing cases).

On rehearing of the *LaBarge* case, the Court once again re-examined the question of causation and the authorities at length. It stated:

"Certainly, physical differences, as is recog-

nized in *Todd v. Occidental Life Ins. Co. of California*, ____ Or ____, 303 P2d 492, render some more susceptible to the sustaining of crippling disabilities after trauma than others, but unless the differences are great enough in and of themselves to threaten imminent disability of the kind actually resulting, they cannot later be said to have been the cause of the disability.”

The Court further said:

“The evidence brings this case fully within the rule which treats abnormalities as dormant when they do not prevent the insured from going about his daily activities and earning his livelihood. When such is the case, the abnormality is not deemed the cause if an accident happens which lowers the resistance and thereby permits the dormant condition to disable the insured.”

Applying the rules of these decisions to the instant case, we arrive at precisely the result which was reached by the able trial court, who stated in his opinion (Glens Falls R. 17, Lloyd’s R. 19):

“The trial consumed a considerable number of days. Six eminent heart specialists, and several other highly qualified medical specialists testified at great length. The court having been placed in the uninviting position of testing the sharply conflicting conclusions of the medical experts with respect to the manner of occurrence of the death, it has reviewed the testimony and the record, and has been convinced

by a preponderance of the evidence that the assured at the time of his death was a vigorous, robust man of normal health for his age; that the condition of his heart and arteries, while less than perfect when measured by a standard of perfection, was 'normal' and 'healthy' and not diseased within the meaning of those words for purposes of the policies in question; that on February 10, 1953, an accidental discharge of assured's shotgun resulted in injury to the assured to the extent of powder burns and at least one gunshot pellet being propelled into his face; that as a consequence of these bodily injuries a shock reaction commenced in the assured which terminated with heart failure; that although a heart which was perfect when measured on an absolute standard would have withstood the pain and shock of the injuries received by the assured, many hearts which are considered in view of the age and general condition of their possessors normal and robust, and not diseased within the meaning of the policies in question, might have succumbed to injuries and shock such as those received by the assured; that the assured in fact succumbed by reason of the injuries and resultant shock he accidentally sustained; and that the plaintiff has sustained his burden of proof on all matters before the court."

In view of the *Todd* and *LaBarge* decisions, defendants' argument that the death of the insured was caused or contributed to by disease is clearly

without merit. There is ample evidence, under the *Todd* decision, that insured's heart, though not perfect, was normal for his age. The *LaBarge* case holds that abnormalities which do not interfere with the insured's living a normal life cannot be considered the cause of a subsequent disability. Certainly, any "abnormalities" in Mr. Lyons' heart, even if it be held not to have been normal despite the testimony that it was, did not interfere with his living a normal existence. Moreover the record establishes that the condition of his heart was such that he would not have died when he did except for the accidental shotgun wounds. See *LaBarge* decision at 64 Or. Adv. Sh. 91.

Other Authorities

The large number of Oregon cases cited by defendants all arise out of wholly dissimilar factual circumstances, and a discussion of them would be fruitless. The argument that because there is no direct evidence of the shotgun blast having preceded the insured's heart attack, the findings of the court must necessarily have been based upon speculation and conjecture is one that has been rejected in a number of cases. This Court, for instance, in order of *United Commercial Travelers v. Groves*, 130 F2d 863 (CCA 9, 1942), a case arising out of the State of Washington where the law with respect to the interpretation of the policy clause here involved is

similar to the Oregon interpretation laid down in the *LaBarge* case, the insured was climbing a ladder and fell off. The court stated:

“There was medical testimony, undisputed, that deceased’s heart was about 20% over normal in size, and that he had hardening of the arteries, although he had had a physical examination about a month prior to his death which disclosed, insofar as the doctor could tell, a normal heart condition. Other medical testimony was in conflict. The cause of the death was a blood clot, coronary occlusion, stopping the flow of blood to one side of the heart. Some medical testimony supported the theory that the shock of the fall caused the blood clot, and other medical testimony supported the theory that the blood clot caused the fall.”

This court held that the jury could and did find that the shock of the fall caused the clot, and the fact that the arteriosclerosis made the deceased less immune to that catastrophe would not prevent recovery. The fact that there was no direct evidence that the heart attack had not preceded and caused the fall did not prevent the jury from drawing the conclusion that a person with a normal heart required some outside agency in order to bring about the death.

In *New York Life Insurance Co. v. Hoffman*, 218 F2d 465 (CA 6, 1954), the insured died in an automobile accident. The only eye-witness testified that

the insured did not have his hands on the steering wheel but was bent backwards on the driver's seat when the car left the highway. The Court, in a per curiam opinion, held that the testimony that the insured had never been sick, and had a normal heart, was sufficient to take to the jury the question of whether death was caused by external, violent and accidental means. Among other testimony mentioned by the Court was the evidence of a well-qualified doctor who swore that the occlusion which caused the insured's death had been brought about by the accident. Obviously, this doctor could not know whether the heart attack preceded the accident or followed it, but his opinion was not dismissed as speculation and conjecture.

In *Carolina Life Ins. Co. v. Williams*, 210 F2d 477 (CA 5, 1954), the evidence was that the insured went into a pasture to catch a horse, that while he was in the pasture an individual hunting rabbits nearby fired a shot, and that the insured's body was later found in the pasture. There was evidence that the insured had been on the horse. There was also evidence that the horse was gun shy. Insured died of a ruptured aorta, and it could have been caused by a fall from a horse. The Court of Appeals held that the verdict was based upon mere speculation because the jury could not know whether the ruptured aorta was caused by the insured's jumping on the horse, which would not have been accidental,

or by falling from the horse when it was frightened by the firing of the gun. The Supreme Court of the United States, *Williams v. Carolina Life Ins. Co.*, 348 US 802, 75 S. Ct. 30, 99 L. Ed. 633, granted certiorari and reversed, per curiam, without opinion. A petition for rehearing was denied 348 US 889. The facts in that case were not nearly as strong as the facts in the instant case, because under both the theory of the insured and that of the insurance company, death would have been caused in the same way. In the instant case, on the other hand, the actual manner of death was consistent only with the theory of the plaintiff. Nevertheless, in the *Williams* case, the Supreme Court refused to permit a reversal of the judgment upon the ground that it was based upon mere speculation and guess. The issue of whether the insured's death was caused by the insured being thrown from the horse was a proper one for determination by the trier of fact.

In *Prudential Ins. Co. of America v. Carlson*, 126 F2d 607 (CCA 10, 1942), cited with approval by the Oregon court in holding for the insured on rehearing in the *Todd* case, 63 Or. Adv. Sh. at p. 338, the insured was injured in an automobile accident, and died of a coronary occlusion. With reference to the question of causation, the court stated, at p. 611:

“The medical experts for appellant and appellee are in accord that arteriosclerosis is a condition that comes on with advancing years;

that it is quite generally present in persons after reaching middle age; and that notwithstanding its presence, people thus afflicted ordinarily live many years. It is a natural consequence of old age. Medical experts testified on behalf of appellee that a microscopic examination of the heart showed no evidence of previous heart failure of a congestive type; that everything pointed to an 'acute affair'; that but for the trauma, deceased would have lived for years notwithstanding the presence of arteriosclerosis. *Dr. John H. Luke, called as a witness for appellees, on cross examination was asked whether the final cause of death was not the coronary thrombosis and coronary sclerosis and whether all that the trauma did was only to aggravate the then existing condition. He replied, 'No, sir. Just the opposite. The accident was the whole thing.' This testimony amply sustains the finding of the trial court and the judgment based thereon that the death of the insured was the result, directly and independently of all other causes, of bodily injuries received by him in the accident.*" (Emphasis supplied).

In the instant case, too, we have the positive testimony of two doctors that the cause of death was a gunshot wound (R. 227-228, 364). Furthermore, all of the evidence, as in the *Carlson* case pointed to an acute affair, resulting from external and violent causes, and not from any internal or spontaneous cause.

In *Lang v. Metropolitan Life Ins. Co.*, 115 F2d 621 (CCA 7, 1940), the insured, who had not been feeling well during the day, fell face forward on a rug and died within ten minutes. There was evidence that the heart was normal for the decedent's age, although there were a few spots of arteriosclerosis. The doctor gave it as his opinion that the insured had died from hemorrhage as the result of the fracture of his nose. There was, of course, no way for the doctor to know what had caused the insured to fall. The court stated:

“Now, upon this record, the defendant contends that the evidence does not establish that Lang's fall and death was caused by accidental means and counsel insists that Lang did not slip, stumble or suffer an accident which caused him to fall; that he merely collapsed while walking across the hall, and the mere fact that he fell and death occurred does not establish that such fall resulted from accidental means. He also claims that Lang died from heart failure or heart disease and not from injuries.”

★ ★ ★

“The next question to be considered is whether Lang's death occurred as a result of the injuries received in the accident, directly or independently of all other causes. The question as to what was the cause of death, was one of fact, *Christ v. Pacific Mutual Life*, 312 Ill. 525, 144 N. E. 161, 35 A.L.R. 730, *Prehn v. Metropolitan Life Ins. Co.*, 267 Ill. App. 190, *Rebenstorf v.*

Metropolitan Life Ins. Co., 299 Ill. App. 71, 19 N. E. 2d 420.

“In considering this contention it is well to keep in mind that it is the duty of the jury to pass upon the credibility of the witnesses and the weight of the testimony and if the jury believed the testimony of the witnesses for the plaintiff to be true, then it was its province to find that Lang’s death occurred as a result of an injury received in an accident directly and independently of all other causes.

“After due consideration of the record we have reached the conclusion that there was sufficient evidence to support the verdict. It must therefore prevail.”

In *Maryland Casually Co. v. Stark*, 109 F2d 212, (CCA 9, 1940), this Court, in a case arising out of the Nevada District Court, reviewed a jury verdict in favor of plaintiff. The insured had died as a result of drowning in an irrigation ditch. He had suffered a brain hemorrhage. There were no witnesses to his falling into the ditch, and the insurance company contended that the hemorrhage had preceded the fall and caused it. The court stated, at p. 214:

“We have reviewed the evidence, giving ‘due regard’ to ‘the opportunity of the trial court to judge of the credibility of the witnesses’, and as a result, particularly in view of the agreed fact that the insured fell into the water and in view of the oral testimony indicating healthy physical

condition, that the cause of death was asphyxiation by drowning, that the hemorrhage followed rather than preceded the fall and probably was caused by the asphyxiation, we hold there was no error in finding that the deceased 'accidentally fell into the * * * (ditch) and as a direct result thereof, independently and exclusively of all other causes, the said * * * (deceased) then and there died by drowning in said * * * (ditch). That said accident and death was not caused or contributed to directly or indirectly, wholly or partly, by bodily or mental infirmity, or by any kind of disease; * * *', and that there was no error in refusing to adopt the finding requested by appellant."

Once again, despite the fact that there was no direct evidence of the time sequence, the court held the medical testimony sufficient to establish the case.

Similarly, in *Preferred Accident Ins. Co. of New York v. Combs*, 76 F2d 775 (CCA 8, 1935), in which the deceased had arteriosclerosis, the court stated as follows with respect to the question of the time sequence:

"The second matter urged by defendant is that it was not shown that the fall was accidental in the sense of the policy because, according to its theory, it was caused or might have been caused by a hemorrhage brought on from excitement occasioned by the controversy with Karschner. The evidence is clear that a hemorrhage in one having friable arteries, and

deceased had such, might be caused by external force or by excitement. It is the contention of appellant that the controversy with Karschner excited the deceased, causing a hemorrhage which resulted in the fall. The evidence of the plaintiff negatives the existence of excitement. The further evidence of the autopsy shows a hemorrhage at the place where the outside force appeared to have struck the head. The first would make a jury question. While still leaving the matter a question for the jury, the latter evidence almost precludes a finding such as that contended for by defendant. It is very strong physical evidence that the external force caused the hemorrhage rather than that the hemorrhage occurred first and happened to be at the precise point where the external force later was applied. There was, therefore, ample evidence to authorize the submission of that matter to the jury."

Even the case of *Devine v. Southern Pacific Co.*, 207 Or 261, 295 P2d 201 (1956), cited by appellants indicates that a positive statement by a competent medical witness as to the fact of causation is sufficient to take the case to the jury. We need not rest on the mere statement of causation, because the opinion of the doctor was amply explored and shown to be based on a firm foundation. Plaintiff carried her burden of proof in all respects, and the judgment of the court below rests not upon speculation and conjecture but upon a firm factual basis.

Another significant Oregon case is *Bertschinger v. New York Life Ins. Co.*, 166 Or 307, 111 P2d 1016 (1941). That was an appeal from a plaintiff's verdict in an action for double indemnity under a life insurance policy. The insured was found in the river after he had apparently gone on a fishing trip. The defendant contended that he had committed suicide by reason of despondency for having been convicted of practicing medicine without a license. The court held that plaintiff had sustained his burden of proving that death was met from an accidental cause, although there was no direct evidence of the manner in which the insured had died.

In *Buckles v. Continental Casualty Co.*, 197 Or 128, 251 P2d 476, 252 P2d 184 (1952), the insured, who suffered from arteriosclerosis, died in an automobile accident. The issue before the court was in effect whether there was any evidence that the automobile accident which caused the injuries was accidental, and not caused by a heart attack. The Court stated, 197 Or at p. 136:

"Proof of the fact that an accident preceded and caused the death need not be established by direct evidence. It is sufficient if from all the facts and circumstances established by the evidence the jury might reasonably infer that an accident happened which proximately resulted in the death. In other words, the fact of accident may be established by circumstantial, as well

as by direct, evidence. *Metropolitan Life Ins. Co. v. Jenkins*, 152 Fla 486, 12 So2d 374.”

The court further stated, at p. 138:

“Defendant’s entire case is built upon the proposition that under the facts of this case a jury must speculate whether the car was caused to leave the highway because of some mishap, or whether it was brought about by decedent’s suffering a heart attack. A complete answer to this contention is to be found in *Metropolitan Life Ins. Co. v. Jenkins*, supra.

“It is our opinion, however, that the evidence eliminates heart attack entirely as a factor in this case. *Wholly apart from the direct testimony of the medical expert that arteriosclerosis did not, nor did angina pectoris, play any part in the death, which in and of itself is sufficient to take the question of heart attack out of the case*, it is obvious that had decedent suffered such an attack severe enough to cause him to lose control over the car, the same attack would no doubt have prevented him from setting the brakes in an effort to stop. It must be kept in mind that only a second or two could possibly have elapsed while the car was crossing and leaving the highway.” (Emphasis supplied).

We cannot do better than to end this argument with a quotation from the above-cited case of *Metropolitan Life Ins. Co. v. Jenkins*, so heavily relied upon in the very recent *Buckles* case. In *Jenkins*,

the insured died when his car drove over a cliff. The only eye witness report was that plaintiff's hand was seen twitching and jerking as the car sank in the water. Defendant claimed that an epileptic or some other type of convulsion to which insured had once been subject caused the car to go off the road. The Court stated the appropriate rule to be applied in this situation in the following language:

“As we have said before, the burden rests upon the plaintiff of proving by a preponderance of the evidence that death was within the terms of the policy. An even balancing of the evidence on the issue presented by the declaration will fail to sustain such burden. But such allegations need not be supported by direct proof. Indeed, there are times when such proof cannot be forthcoming. Under such circumstances, it surely cannot be seriously contended that there can be no recovery simply because there is no proof of the precise condition that brought the accident about. If that were the rule, no death by accidental means could ever be inferentially established; and no accidental death could ever become a ground for recovery under a policy like this, unless it happened in the presence of eye witnesses in such manner as to impress upon them every detail of the accident. The true rule is that such allegations need not necessarily be supported by direct proof. Circumstantial evidence will support a verdict for plaintiff, if the circumstances surrounding and leading up to a violent and ex-

ternal death be such as to create in the minds of reasonable men acting as jurors a strong belief that death was caused solely by accidental means; and as to rationally outweigh the probability that it was contributed to by disease or bodily or mental infirmity. The test of the sufficiency of such proof is whether these circumstances, when viewed as a whole reasonably exceed by their preponderant probative weight any other equally plausible explanation well-founded in evidence."

CONCLUSION

It is the sincere hope of counsel for the plaintiff that the extended length of this brief will not obscure the basic fact that plaintiff succeeded in proving her case by the overwhelming preponderance of satisfactory evidence. In fact, plaintiff respectfully suggests to this Court that this appeal, which consists of nothing but a reargument of factual questions presented to and decided by Judge Murphy on very substantial evidence is frivolous. As this Court warned in *Mason v. Summer Lake Irr. Dist.*, 216 F2d 609 (1954), the damages provided by 28 USCA §1912 should be imposed in this case. Compare *Massachusetts Bonding & Ins. Co. v. Feutz*, 182 F2d 752, 758 (CA 8, 1950).

Appellants present a mass of speculation, conjecture, contrary inferences and assumptions which they prefer to draw from the testimony. The trier of fact, however, was, as he himself stated "placed in the uninviting position of testing the sharply conflicting conclusions of the medical experts with respect to the manner of occurrence of the death." His memorandum opinion shows his thorough understanding of the issues, and further indicates that he quite justifiably placed greater weight on the testimony of plaintiff's expert witnesses for the excellent reason that they had had the opportunity to personally observe the insured at moments of peak exertion.

The basic issue in this case, beneath all the medical testimony and terminology, is a relatively simple one. That issue is whether the insured's heart was diseased in some manner which caused his death or whether death was caused by some outside force which produced shock and consequent arrhythmia. The unanimous conclusion of the doctors who had seen and examined insured during his life was that his heart was normal. There was nothing shown in the autopsy report which would change or affect this conclusion. On the basis of these relatively simple facts, the court was fully justified in concluding that the insured died as a result of an experience producing anguish and shock, and that that experience was the accidental explosion of a magnum shotgun in his face.

The two judgments of the court below are correct, and should be affirmed. Under Oregon law, ORS 736.325 (2), plaintiff is entitled to a reasonable attorney's fee in connection with this appeal.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

UNDERWRITERS AT LLOYD'S, LONDON,
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Appellant,

vs.

JANE S. LYONS,

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GLENS FALLS INDEMNITY CO., a Corporation,
Appellant,

vs.

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Appellee.

REPLY BRIEF OF APPELLANTS

*Upon Appeal from the United States District Court
for the District of Oregon.*

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REPLY BRIEF OF APPELLANTS

*Upon Appeal from the United States District Court
for the District of Oregon.*

**REPLY OF APPELLANTS TO RELEVANT
OREGON CASES CITED BY APPELLEE**

Appellee, at page 35 of her brief, refers to the failure of Appellants to mention to the court two recent decisions of the Supreme Court of Oregon, namely: *Todd v.*

Occidental Life Ins. Co., 62 Or. Adv. Sh. 675, 295 P2d 870 (1956) withdrawn on rehearing, 63 Or. Adv. Sh. 333, 303 P2d 492 (1956), and *LaBarge v. United Ins. Co.*, 63 Or. Adv. Sh. 345, 303 P2d 498 (1956), confirmed on rehearing, 64 Or. Adv. Sh. 81, 306 P2d 380 (1957).

As counsel for the Appellants, we are of course mindful and aware of the above Oregon authorities; however, they were neither cited nor discussed under ground "C," page 48 of Appellants' brief, for the very obvious reason that the question there presented by Appellants is whether there is *any competent substantial evidence* in the record to sustain Appellee's burden of proof and to support the court's finding that the insured's death was not caused or contributed to by disease. It is the position of Appellants, as pointed out in our opening brief, the record fails to disclose any competent substantial evidence.

The *Todd* case and the *LaBarge* case apparently follow what appears to be a generally accepted rule that those infirmities which are generally considered normal to mankind at the various stages of life cannot be considered as a concurring cause of disability.

Certainly the *Todd* case and the *LaBarge* case do not overrule *Hutchison v. Aetna Life Insurance Company*, 182 Or. 639, 189 P2d 586, where the Supreme Court of Oregon considered the same proposition urged by the Appellants in this case; *Was there any substantial evidence* to support a verdict in favor of plaintiff? The court found in the negative and reversed the lower court, thus finding for the defendant insurance carrier.

We believe, and strongly so, that the "opinions" of Dr. Rush and Dr. Chamberlain that the deceased had a "normal heart" are incompetent opinions in that the doctors engaged entirely in speculation and conjecture as to the extent of the involvement of the coronary arteries, namely the reported diminishment of the caliber of the coronary arteries of the deceased from atheromatous deposits (Ex. 15) (R. 266, 271, 312, 445, 487-9). Were the doctors qualified to render an opinion as to the condition of the deceased's heart and *completely ignore the autopsy findings?* We believe not.

Hence the *Todd* case and the *LaBarge* case were not discussed under ground "C," page 48 of Appellants' brief. It is not the purpose of Appellants to burden the court with a repetition of argument and authorities and thus prolong discussion of this point further, as we have attempted to thoroughly present the matter in our opening brief. We did, however, deem it proper and necessary to again raise the point and briefly discuss it with the court in view of the statements of Appellee's brief on page 35 thereof.

REPLY OF APPELLANTS TO OTHER AUTHORITIES CITED BY APPELLEE

With respect to said authorities cited by Appellee in her brief, it appears from a review of the same that they were resolved on the premise of competent medical testimony and, *in addition thereto, other physical evidence of an accident* or mishap having occurred. To support the above remarks Appellants will refer briefly to a few of these cases as follows, and will likewise include the case of *Buckles v. Continental Casualty Co.*, 197 Or. 128, 251 P2d 476, 252 P2d 184 (1952).

(a) In *Preferred Accident Ins. Co. of New York v. Combs*, 76 F2d 775 (CCA 8, 1935), evidence disclosed that there was a statement by the deceased after the accident occurred and before his death that he *slipped and fell*, and the autopsy report which was in evidence and taken for what it stated showed a hemorrhage at the place where the outside force struck the head.

(b) In *Maryland Casualty Co. v. Stark*, 109 F2d 212, (CCA 9, 1940), it was agreed by the parties that the deceased fell into the water, and the autopsy report which was accepted as to its contents stated that the probable cause of death was *asphyxiation by means of drowning*. The court in its opinion was particularly impressed by the agreed facts that the assured fell into the water, and so stated.

(c) In *Lang v. Metropolitan Life Ins. Co.*, 115 F2d 621 (CCA 7, 1940), all of the doctors who testified participated in an autopsy of the deceased's body, the de-

ceased having fallen forward on his nose and bled profusely. Thus the testimony of those doctors was based on competent and satisfactory evidence and not on speculation and conjecture as in the case at bar.

(d) In *New York Life Insurance Co. v. Hoffman*, 218 F2d 465 (CA 6, 1954), we wish to point out that Appellee, in her comments on this case at page 41 of her brief, fails to point out that in addition to the occlusion which was found in the autopsy in the Hoffman case, and which autopsy was accepted by the medical experts, that the medical opinion was that the deceased in the Hoffman case met his death as a result of a cut which penetrated the outer layer of the larynx allowing entrance of blood into the larynx and a resultant choking to death of the deceased.

(e) In *Buckles v. Continental Casualty Co.*, supra, the autopsy was performed upon the body of the deceased and the vital organs examined by qualified experts and such expert testimony indicated that the death of the deceased *resulted from shock and loss of blood as a result of blows and injuries to the head and body*. In that case the examination of the body disclosed a crushed nose, a gash on the neck on the right side, bruises on the head and arm. Under the scalp and covering the top of the head from the forehead to the back thereof, there was clotted blood from $\frac{1}{4}$ to $\frac{1}{2}$ inch thick.

It is significant to note that Appellee in her brief fails to discuss the case of *Annereau v. Ewauna Box Co.*, 176 Or. 509, 159 P2d 215, which case is discussed in detail in Appellants' opening brief and which will, for obvious reasons, not be further discussed at this time.

CONCLUSION

In conclusion Appellants reiterate the conclusion set out in their opening brief and wish to answer Appellee's contention that this is a *frivolous* appeal by stating that a review of this case by this Honorable Court could not be urged with more seriousness and honesty, based upon our best research, our study of the record and the authorities cited.

Respectfully submitted,

R. E. KRIESIEN,

RAY MIZE,

Attorneys for Appellants.

MEINDL, MIZE & KRIESIEN,

1431 American Bank Building,

Portland 5, Oregon,

Of Counsel.

No. 15416

United States
Court of Appeals
for the Ninth Circuit

VICTOR MANUEL GIL, Appellant,

vs.

ALBERT DEL GUERCIO, as District Director
of the Immigration and Naturalization Service
at Los Angeles, California, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

MAR 12 1957

PAUL P. O'BRIEN, CLERK

No. 15416

United States
Court of Appeals
for the Ninth Circuit

VICTOR MANUEL GIL, Appellant,

vs.

ALBERT DEL GUERCIO, as District Director
of the Immigration and Naturalization Service
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Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Southern District of California, Central Division

No. 19655-T

VICTOR MANUEL GIL, Plaintiff,

vs.

GORDON CORNELL, JOHN DOE and JANE DOE, Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

Comes now the plaintiff Victor Manuel Gil and for cause of action against the defendants, and each of them, complains and alleges:

I.

That he is now and has been for more than two years last past a resident of the County of Los Angeles and that same is situate in the area of jurisdiction of above described court.

II.

That this court has jurisdiction of the above described matter by virtue of the provisions of the Administrative Procedure Act, Sec. 10, of 1946, commonly known as the A.P.A., 60 Stat. 243; Title 5, United States Code, Section 1009.

III.

That the defendant Gordon Cornell is the duly appointed Officer in Charge of the Los Angeles of-

fice of the Immigration and Naturalization Service of the United States and is under the supervision and direction of the Attorney General of the United States and the Commissioner of Immigration and Naturalization, as well as the District Director for this District, said District Director having headquarters at San Francisco, California; that said defendant Gordon Cornell, as office in charge of the Los Angeles office, is charged with the administration and execution within said area of the above district of the orders of the Immigration and Naturalization Service and the immigration laws of the United States.

IV.

That plaintiff is informed and believes and upon said ground alleges that defendants John Doe and Jane Doe are Acting Officers in Charge of the Los Angeles office of the agency heretofore named with the same rights, duties and responsibilities as the Officer in Charge, as alleged above.

V.

The plaintiff does not know the true name or names of those defendants sued under the fictitious names of John Doe and Jane Doe and asks leave of Court to amend showing the true name of each when same shall be ascertained.

VI.

That on or about the 11th day of March, 1955, an order was made and entered for the Office in Charge of the Los Angeles office of the United States Immigration and Naturalization Service for

the deportation of the plaintiff from the United States to Mexico. Plaintiff is informed and believes that said Order has never been cancelled or rescinded or vacated.

VII.

Plaintiff alleges that he has exhausted all administrative remedies.

VIII.

Plaintiff contends that by virtue of the entry of said Order of Deportation he is about to be taken into custody for deportation and deprived of his liberty unlawfully, all in violation of due process of law and the Fifth Amendment to the Constitution of the United States, for reasons as hereinafter more fully set forth.

IX.

Plaintiff entered the United States at San Ysidro, California on or about November 25, 1953, and has been a resident of the United States since that date.

X.

Plaintiff reads and writes Spanish, but neither is able to speak, read or write in the English language, Spanish being his native tongue.

XI.

Plaintiff is a person of good moral character and has never been arrested, traffic citations excepted, save and except by the aforesaid agency. That he is steadily employed and has never asked for or received assistance from any organization, governmental or otherwise.

XII.

That on or about the 27th day of January, 1955, a warrant of arrest was served upon the plaintiff by said agency and he is now, and since date of service of warrant, been at liberty under bond as requested and furnished.

XIII.

That the entry of the order, as aforesaid, was predicated upon an order of deportation made on March 11, 1955, at an administrative hearing on said date, as aforesaid.

XIV.

That the order of March 11, 1955, as aforesaid, was not based upon reasonable, reliable, probative and/or substantial evidence.

XV.

That the said order of deportation was arbitrary, capricious and a denial of due process of law and the rules and regulations of the immigration service.

XVI.

That the Immigration and Naturalization Service, by and through its office in charge of the Los Angeles office, has entered the order of deportation and denied voluntary departure based upon unreasonable, unsubstantial and unreliable evidence and in direct violation of due process of law and the Fifth Amendment of the Constitution of the United States. By reason of the foregoing there is an actual controversy existing between the parties hereto with respect to the validity of said Order

of Deportation and its entry and with respect to the enforcement thereof against the plaintiff by the defendants, or either of them, or anyone acting under their control or direction.

XVII.

Plaintiff is informed and believes and upon the basis of said information and belief alleges that unless restrained by the Order of this Court, the defendant Gordon Cornell, and/or defendants John Doe or Jane Doe, by and through his/their agents and employees intends to and will take plaintiff into custody under color of said Order of Deportation, entered as aforesaid, and will deprive him of his liberty and the opportunity to earn his livelihood, to his irreparable damage and will continue to act without authorization in law and threatens to and will deprive him of his liberty without recourse.

XVIII.

Plaintiff seeks (1) a Declaratory Judgment that the Order of Deportation of March 11, 1955, is void and without force and effect and, (2) an injunction restraining defendants, or any of them, from proceeding against the plaintiff under said Order, pending the determination of the validity of said Order, and permanent injunction if said Order is declared void.

XIX.

Plaintiff is without a plain, speedy or adequate remedy at law to prevent or redress such irreparable damage and injury as will result from *her* summary removal from the United States.

Wherefore, Plaintiff Prays For The Following Judgment:

1. That the Order of Deportation be declared illegal and void and without force and effect.
2. That an order be issued permanently enjoining and restraining defendants, and each of them, from deporting the plaintiff.
3. Such other relief as is proper.

/s/ JOHN P. TOBIN

Attorney for Plaintiff.

Duly Verified.

[Endorsed]: Filed March 13, 1956.

[Title of District Court and Cause.]

ORDER DENYING PRELIMINARY INJUNCTION AND DISCHARGING ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Plaintiff's Order to Show Cause having come on for hearing in the above-entitled action before the Honorable William M. Byrne, United States District Judge, on the 26th day of March, 1956, at 9:45 o'clock a.m., a Return to the Order to Show Cause having been filed, and the Court being fully advised,

Now, therefore, it is hereby ordered, adjudged and decreed that the request for preliminary injunction is hereby denied and the temporary re-

straining order and order to show cause be and the same are hereby discharged.

Dated: This 4th day of April, 1956.

/s/ WM. M. BRYNE,
United States District Judge

Affidavit of Service by Mail Attached.

[Endorsed]: Docketed and Entered April 4, 1956.
Filed April 4, 1956.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Gordon Cornell, by and through the undersigned, and in answer to the Complaint for Declaratory Judgment and Injunction on file herein, admits, denies, and alleges as follows:

I.

Admits the allegations contained in Paragraphs I and III of the Complaint.

II.

Answering Paragraph VI of the Complaint, admits that an order of deportation of the plaintiff was entered on March 11, 1955, and that the said order is a present, valid, subsisting and final order; denies that the said order was made and entered for the Officer in Charge of the Los Angeles Office of the United States Immigration and Naturalization Service, and alleges that this order was the order of the Special Inquiry Officer.

III.

Answering Paragraph VIII of the Complaint, defendant admits that plaintiff will be taken into custody for deportation upon the warrant of deportation issued pursuant to the order of deportation; denies each and every allegation other than those admitted and in the said paragraph contained. Defendant alleges that at the time the Complaint herein was filed, it was intended to deport the plaintiff from the United States pursuant to law, but that no action will be taken to effect the deportation of plaintiff until the present judicial proceeding is terminated.

IV.

Answering Paragraph IX of the Complaint, defendant admits the plaintiff entered the United States at San Ysidro, California, on or about November 25, 1953; admits that the plaintiff has remained within the United States since that date.

V.

Answering Paragraphs X and XI of the Complaint, defendant neither admits nor denies the allegations therein contained on the ground that said allegations contain irrelevant and immaterial matter.

VI.

Admits the allegations in Paragraph XII of the Complaint.

VII.

Answering Paragraph XIII of the Complaint, defendant denies each and every allegation in said paragraph contained; and alleges that an order of

deportation was entered on March 11, 1955, after an administrative hearing on February 24, 1955.

VIII.

Answering Paragraphs XIV, XV, and XVI of the Complaint, defendant denies each and every allegation in each of said paragraphs.

For a further, separate and first affirmative defense to the complaint, the defendant alleges:

I.

The plaintiff herein has been accorded a full and fair hearing in conformity with law to determine his right to be and remain in the United States. There will be offered in evidence when this cause comes on for hearing a certified record of the Immigration and Naturalization Service, Department of Justice, relating to the plaintiff herein, containing the complete record of the deportation proceedings before the Immigration and Naturalization Service.

Wherefore, defendant prays for a judgment dismissing said Complaint, denying the relief prayed for therein, and for such other relief as to the Court seems just and proper in the premises.

LAUGHLIN E. WATERS,

United States Attorney

MAX F. DEUTZ,

Assistant U. S. Attorney,

Chief of Civil Division

/s/ ANDREW J. WEISZ,
Assistant U. S. Attorney,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 16, 1956.

[Title of District Court and Cause.]

STIPULATION SUBSTITUTING ALBERT
DEL GUERCIO AS DEFENDANT IN
PLACE AND STEAD OF GORDON COR-
NELL

It is hereby stipulated, by and between the parties, through their respective attorneys of record, that Albert Del Guercio, as District Director of the Immigration and Naturalization Service at Los Angeles, California, be and he is hereby substituted as defendant in the above entitled action in the place and stead of Gordon Cornell.

Dated: October 22nd, 1956.

/s/ JOHN P. TOBIN,
Attorney for Plaintiff
LAUGHLIN E. WATERS,
United States Attorney
MAX F. DEUTZ and
ARLINE MARTIN,
Assistant U. S. Attorneys
/s/ ARLINE MARTIN
Attorneys for Defendant

It is so ordered this 22nd day of October, 1956.

/s/ WM. M. BRYNE,

United States District Judge

[Endorsed]: Filed October 22, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED PRE-TRIAL
ORDER

At a conference held under Rule 16, F.R.C.P., by direction of Wm. M. Bryne, Judge, the following admissions and agreements of fact were made by the parties and require no proof:

(1) It is stipulated that the plaintiff is a native and citizen of Mexico. He last entered the United States about November 25, 1953. He entered the United States without inspection.

(2) That voluntary departure was denied although requested; that it was determined in the decision that plaintiff was statutorily eligible for the granting of the relief.

Issues of Law to Be Determined

(1) Did plaintiff have a fair hearing?

(2) Was the denial of voluntary departure an abuse of discretion.

The foregoing admissions of fact have been made by the parties in open court at the pre-trial conference; and issues of fact and law being thereupon

stated and agreed to, the Court makes this Order which shall govern the course of the trial unless modified to prevent manifest injustice.

Dated: October 22, 1956.

/s/ WM. M. BRYNE,
Judge of the U. S. District Court.

The foregoing pre-trial Order is hereby approved:

/s/ JOHN P. TOBIN,
Attorney for Plaintiff

LAUGHLIN E. WATERS,
U. S. Attorney

/s/ By ARLINE MARTIN
Attorneys for Defendants

[Endorsed]: Filed October 22, 1956.

In the United States District Court for the Southern District of California, Central Division

Civil No. 19655-WB

VICTOR MANUEL GIL, Plaintiff,

vs.

ALBERT DEL GUERCIO, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

The above-entitled cause having come on for trial

on November 5, 1956, at 2 p.m., before the Honorable William M. Bryne, District Judge Presiding, plaintiff being represented by his attorney, John P. Tobin, and the defendant being represented by his attorneys, Laughlin E. Waters, United States Attorney, Max F. Deutz and Arline Martin, Assistant United States Attorneys, and the Court having received in evidence a certified record of the Immigration and Naturalization Service relating to the deportation proceedings as to the plaintiff, and the Court having heard the arguments of counsel, and having taken the within cause under submission, and being fully advised in the premises, now makes its Findings of Fact, Conclusions of Law, and Judgment.

Findings of Fact

I.

Plaintiff is an alien, a native and citizen of Mexico. He last entered the United States on or about November 25, 1953, near San Ysidro, California, without inspection by the Immigration and Naturalization Service. Prior thereto, and on or about November 21, 1953, the plaintiff, under order of deportation, had been granted voluntary departure from the United States and had voluntarily departed to Mexico.

II.

On January 25, 1955, a warrant of arrest in deportation was issued by the Immigration and Naturalization Service, Los Angeles, California, charging that the plaintiff was subject to deportation

under the provisions of Section 1251(a)(2) of Title 8 of the United States Code, Section 241(a)(2) of the Immigration and Nationality Act, in that he had entered the United States without inspection.

III.

Pursuant to the aforesaid warrant of arrest, a deportation hearing was held and a decision rendered that plaintiff was subject to deportation and that plaintiff was statutorily eligible for voluntary departure, but denying said voluntary departure. No appeal was ever taken from said order of deportation and said order of deportation became final.

Conclusions of Law

I.

This Court has jurisdiction of the within cause under the provisions of the Administrative Procedures Act, 5 U.S.C.A. 1009 et seq.

II.

The deportation proceedings relating to plaintiff were fair, in accordance with law, and did not violate any of the plaintiff's constitutional rights, and there was due process and a fair hearing.

III.

There was no abuse of discretion in defendant's denial of voluntary departure to the plaintiff.

IV.

The order of deportation outstanding against the plaintiff is valid and plaintiff is deportable pursuant to said order.

V.

Judgment should be entered in favor of the defendant and against plaintiff, denying the relief prayed for in the complaint for judicial review, for declaratory judgment and injunction on file herein, and awarding the defendant his costs.

VI.

The defendant Albert Del Guercio, substituted herein in place and stead of Gordon L. Cornell, is the proper party defendant in the action and, there being no parties substituted for the John Does joined as defendants should be dismissed from the action.

Judgment

In accordance with the foregoing Findings of Fact, and Conclusions of Law, It Is Ordered, Adjudged and Decreed:

1. That judgment is hereby entered in favor of the defendant and against the plaintiff; that the order of deportation outstanding against the plaintiff is valid and plaintiff is deportable pursuant to said order.

2. The relief prayed for in the complaint for declaratory relief and injunction shall be and the same is hereby denied; and the John Doe defendants are hereby dismissed from the action.

3. The defendant shall have his costs incurred herein in the amount of \$20.00.

Dated: November 23, 1956.

/s/ WM. M. BRYNE,
United States District Judge

Affidavit of Service by Mail attached.

[Endorsed]: Lodged November 13, 1956. Docketed and Entered November 26, 1956, and Filed November 23, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Victor Manuel Gil, plaintiff in the above-described action, appeals to the United States Court of Appeals for the Ninth Circuit from:

1. The Judgment made and signed on November 26, 1956, and the whole thereof.
2. Denial of relief prayed for in the complaint for declaratory relief and injunction.

Dated at Los Angeles, California this 3rd day of December, 1956.

/s/ JOHN P. TOBIN,
Attorney for Plaintiff

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 3, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Briefly stated, the points of appeal are:

1. The administrative ruling denying voluntary departure constituted an abuse of discretion; and,
2. Administrative hearing was unfair; and,
3. Judgment of trial court is contrary to law.

/s/ JOHN P. TOBIN,
Attorney for Plaintiff

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 12, 1956.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Plaintiff, who heretofore has filed his Notice of Appeal, does hereby make the following designation of contents of record on said appeal:

1. Complaint for Declaratory Judgment and Injunction;
2. Answer of defendant;
3. Order denying preliminary injunction, etc.;
4. Stipulation substituting Albert Del Guercio, etc.;

5. Pre-trial Order;

6. Findings of Fact, Conclusions of Law and Judgment; and,

7. Notice of Appeal, etc.

Dated: December 11, 1956.

/s/ JOHN P. TOBIN,

Attorney for Plaintiff-Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 12, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 27, inclusive, containing the original

Complaint;

Order Denying Preliminary Injunction and Discharging Order to Show Cause and Temporary Restraining Order;

Answer;

Stipulation Substituting Albert Del Guercio as Defendant in Place and Stead of Gordon Cornell;

Plaintiff's Proposed Pre-trial Order;

Findings of Fact, Conclusions of Law, and Judgment;

Notice of Appeal to the U. S. Court of Appeals;

Statement of Points on Appeal;

Designation of Contents of Record on Appeal.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Witness my hand and the seal of said District Court, this 10th day of January, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF CON- TENTS OF RECORD ON APPEAL

Plaintiff, who has heretofore filed his designation of contents of record on appeal, hereby makes the following supplemental designation:

1. All original exhibits.

Dated: January 18, 1957.

JOHN P. TOBIN,
Attorney for Plaintiff

[Endorsed]: Filed January 25, 1957.

[Endorsed]: No. 15416. United States Court of Appeals for the Ninth Circuit. Victor Manuel Gil, Appellant, vs. Albert Del Guercio, as District Director of the Immigration and Naturalization Service at Los Angeles, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: January 11, 1957.

Docketed: January 22, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15416

VICTOR MANUEL GIL, Appellant,

vs.

ALBERT DEL GUERCIO, Respondent.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF RECORD

The appellant hereby adopts the statement and designation, including the supplemental designation of contents of record, appearing in the typewritten record.

Dated: January 21, 1957.

/s/ JOHN P. TOBIN,
Attorney for Appellant

[Endorsed]: Filed January 22, 1957. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION THAT EXHIBITS MAY BE
CONSIDERED IN THEIR ORIGINAL
FORM

It is hereby stipulated by and between the above
named parties through their respective counsel of
record that the exhibits may be considered in their
original form without the necessity of reproducing
them in the printed record.

Dated: January 25, 1957.

/s/ JOHN P. TOBIN,
Attorney for Appellant

LAUGHLIN WATERS,
United States Attorney

/s/ By ARLINE MARTIN,
Assistant United States Atty.

Attorneys for Respondent

[Endorsed]: Filed January 29, 1957. Paul P.
O'Brien, Clerk.

No. 15416
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

VICTOR MANUEL GIL,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director of the Immigration and Naturalization Service at Los Angeles, California,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

JOHN B. TOBIN,

1120 Guaranty Building,
6331 Hollywood Boulevard,
Hollywood 28, California,

Attorney for Appellant.

FILED

APR 10 1957

PAUL P. GIBLIN, CL.

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No. 15416
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

VICTOR MANUEL GIL,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director of the Immigration and Naturalization Service at Los Angeles, California,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Jurisdictional Facts.

A verified complaint entitled "Complaint for Declaratory Judgment and Injunction" was filed on March 13, 1956, in the District Court for the Southern District of California by the appellant while at liberty on bond [3-8].¹ The defendant was Albert Del Guercio, appellee herein, and substituted for the originally named defendant Gordon Cornell, by stipulation on October 22, 1956 [12],

¹Bracketed numbers refer to pages in printed Transcript of Record unless clearly different by context.

officer in charge of the Los Angeles district of the United States Immigration and Naturalization Service.

The complaint alleged that an Order for his deportation was issued on March 11, 1955 [4] and that an actual controversy exists respecting the validity of said order and the enforcement thereof [6].

The complaint alleged that all administrative remedies has been exhausted [5]; that the entry of the order for deportation, *supra*, was not based upon reasonable, reliable, probative and/or substantial evidence [6] and that voluntary departure² was denied and that said denial of voluntary departure was predicated upon unreasonable, unsubstantial and unreliable evidence and was arbitrary capricious and a denial of due process of law and the rules and regulations of the immigration service [6].

Prayer of his complaint was for a judgment declaring:

1. Order of Deportation illegal and void and without force and effect; and,
2. Permanent injunction against deportation.

An Order to Show Cause was issued same day and was subsequently discharged [8].

The answer of the defendant denied that the deportation order was based upon unreasonable, unreliable and unsubstantial evidence and in violation of the Fifth Amendment of the United States Constitution and that an actual controversy existed as plaintiff alleged. An affirmative defense was set forth alleging that plaintiff was afforded a full and fair hearing [9-11].

²See appendix.

In accordance with Rule 16, F.R.C.P., a pre-trial order was submitted by counsel for plaintiff and defendant and approved by the trial court [13-14]. In said pre-trial order it was stipulated that plaintiff, appellant herein, was a native and citizen of Mexico who last entered the United States about November 25, 1953, without inspection; that voluntary departure was denied, although requested; and, that the decision had determined that he was statutorily eligible for the relief of voluntary departure.

The said pre-trial order recited the issues of law to be:

1. Did plaintiff have a fair hearing?
2. Was the denial of voluntary departure an abuse of discretion?

The Honorable Wm. M. Byrne, District Judge, made, signed and filed Findings of Fact, Conclusions of Law and Judgment on November 23, 1956, wherein and whereby he found that there was no abuse of discretion in denying voluntary departure to appellant, herein, and ordered judgment in favor of defendant, appellee herein [14-18].

Appellant filed his Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from said Judgment, and the whole thereof, and from the denial of relief sought on December 3, 1956 [18].

The trial court had jurisdiction by virtue of the provisions of the Administrative Procedure Act of 1946 (Sec. 10), commonly known as the A.P.A., 60 Stat. 243; Title 5, U.S.C. 1009.³

³See appendix.

The United States Court of Appeals for the Ninth Circuit has jurisdiction by virtue of the timely filing of the Notice of Appeal [18] from said Judgment, a final judgment, 62 Stat. 929; 28 U.S.C. 1291.

Statement of the Case.

Appellant, now age 24, was born in Mexico, of which country he is a national [15]. He has been a continuous resident of the United States, particularly the Los Angeles area, since November 25, 1953 [5]. He was arrested under an immigration service warrant on January 26, 1955, charged with entering this country without inspection in violation of 8 U.S.C. 1251(a)(2);⁴ 1952 Immigration Act, Section 241(a)(2).

On February 24, 1955, at the immigration service hearing on the warrant, appellant admitted that he had last entered without inspection and his counsel so stipulated [Tr. of Hearing, p. 2]. Appellant admitted a prior illegal entry in October, 1953, and that he was granted immediate voluntary departure without the necessity of a hearing. Testified that he had never been arrested in Mexico or in the United States, save the two on immigration, *supra* [Tr. of Hearing, p. 4].

⁴8 U.S.C.A. 1251 Act of 1952, 66 Stat. 204:

“(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) . . .

(2) entered the United States without inspection . . .”

Prior to commencement of and during the hearing, appellant, through his counsel, applied for voluntary departure.⁵ He furnished a Los Angeles Police clearance showing no arrests and several character letters of recommendation [Tr. of Hearing, p. 7].

During the deportation hearing, the Special Inquiry Officer asked the following:

“Q. The record in your case shows that you were brought to this office on January 26, 1955, and you refused to make a statement at that time. Have you any comment to make on that? A. I had been advised by my attorney not to sign or say anything *until I saw him.*” (Emphasis supplied.) [Tr. of Hearing, p. 5.]

It does not appear in the transcript of the administrative hearing, but at said hearing, probably when we were “off record,” counsel for appellant fully and completely advised the special inquiry officer that he, as attorney for appellant’s employer, was present at said place of appellant’s employment when the immigration officers came in and specifically asked for appellant by name. It was then, and special inquiry officer was so apprised, that counsel advised appellant not to talk or sign anything until he had a chance to talk to him, and this was said in presence of arresting immigrating officers as they were preparing to leave with appellant in their custody.

The decision of the Special Inquiry Officer on page 2, thereof, acknowledged that appellant had established statu-

⁵See appendix.

tory eligibility for the privilege of voluntary departure. It further states that on appellant's apprehension he refused to make a statement or sign any papers on the advice of counsel AND, quoting:

"He was also offered the voluntary departure privilege at that time and refused it." (Emphasis supplied.) [Decision of Hearing, p. 2.]

There is absolutely nothing in record to support said statement. It is unwarranted. The decision, *supra*, denied the request for voluntary.

If the appellant was worthy of the privilege of voluntary departure on his apprehension, he was worthy of it at the hearing. There is not one iota of evidence against appellant, unless it is construed that he offended anyone by asking for his attorney.

To deny voluntary departure at the hearing because alien refused to sign any papers or talk until he saw his attorney is a gross abuse of discretion.⁶ It is particularly pointed out that appellant *did not refuse to talk or sign anything tendered him, but merely declined until he saw his attorney*. The query is primarily whether the denial of effective right to counsel is a violation of the Fifth Amendment to the Constitution and the rules and regulations of the agency, *infra*.

⁶8 U.S.C.A. 1252(b)(2) ". . . The alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;"

Appellant alleged in his complaint that by virtue of the Order of Deportation issued on March 11, 1955 [6], he was about to be taken into custody and deprived of his liberty in violation of due process of law [5] and that an actual controversy exists between appellant and appellee with respect to the validity of said order and the enforcement thereof [6]. He alleged that all administrative remedies had been exhausted [5]. The prayer of his complaint was for a declaratory judgment that the said order was illegal and void and without force and effect and for a permanent injunction against deportation [7] alleging that he had no plain, speedy or adequate remedy to prevent his summary removal from the United States [7-8].

Appellant appealed to the Board of Immigration Appeals from the decision and order of the Special Inquiry Officer and the appeal was dismissed (Decision of Board of Immigration Appeals). The trial court's Finding No. III is erroneous when it states that no appeal was ever taken from said order of deportation [16]. It is true that at all times appellant has admitted entry without inspection, and while the paradox is present that we appealed from all of the Order of the Special Inquiry Officer, we direct this Honorable Court's attention to the flagrant attempt to deny alien right to effective counsel and to use the alien's effort to secure legal advice as a basis for denying voluntary departure.

The trial court, we respectfully submit, erred in its conclusion of law, based upon the findings and the record,

that there was no abuse of discretion in denying voluntary departure. We did not seek to have the trial court substitute its judgment for that of the agency; we did, however, contend that the administrative agency abused its discretion, and respectfully submit that the judgment of the lower court is incorrect and that the administrative agency did abuse its discretion in denying voluntary departure under the unique circumstances of this case.

Specifications of Error.

The appellant makes the following specifications of error of the District Court.

I.

The District Court erred in making said Judgment.

II.

That Finding No. III is in error insofar as it declares that no appeal was taken from the order of deportation and that said order of deportation became final. The decision of the Board of Immigration Appeals in its opening sentence declares that the case is before them on appeal from a decision of a special inquiry officer directing the respondent's deportation. The portion of said finding is contrary to the record. It constitutes a denial of due process and a fair hearing.

III.

That Conclusion of Law No. II is error because there was no due process or fair hearing when the special inquiry officer predicated his decision upon a denial of effective assistance of counsel, all in violation of the Fifth Amendment and the statutes enacted by Congress and the rules and regulations of the agency.

IV.

That Conclusion No. III is in error and unsupported by the record when it concludes that there was no abuse of discretion in denial of voluntary departure to appellant.

V.

That Conclusion No. IV is error when it concludes that the order of deportation is valid and appellant is deportable pursuant to said order because it is based upon an erroneous finding, *supra*, unsupported by the record, and contrary to law.

VI.

That the judgment is improper because:

1. No. 1, thereof, is unsupported by a finding of fact or conclusion of law that is supported by the record; and,

2. No. 2, thereof, is improper because it is based upon a finding and conclusion unsupported by the record.

ARGUMENT.

POINT I.

Administrative Agency Hearing Unfair When Special Inquiry Officer's Decision Arbitrarily Assumes as Ground for Denial of Discretionary Relief Matter Not of Record in Deportation Hearing.

Denial of Effective Service of Counsel Is a Denial of Right of Counsel Guaranteed by Constitution, Congress and Administrative Regulations.

Right of Counsel Means Effective Representation at All Stages of the Proceedings Including Advice on Apprehension, Not Mere Right to Be Present at Deportation Hearing.

It Is an Arbitrary Denial of Fair Hearing and a Denial of Due Process to Deny Alien Voluntary Departure Who, on Advice of Counsel, Refused to Talk or Sign Anything on Apprehension Until He Saw His Counsel.

Appellant Applied for Discretionary Relief of Voluntary Departure Prior to and During the Hearing, and Subsequent to Issuance of Warrant of Arrest as Rules of Agency Provide.

The Constitution of the United States, Amendment VI, provides for right of counsel in criminal matters and over the years this has grown to include immigration proceedings, theoretically civil in nature.

The 1952 Immigration and Naturalization Act, Section 1252(b)(2), provides that "(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

The immigration agency regulations, 8 C.F.R. 244.14 (b), provides that the alien shall be advised of his right to be represented by counsel and that this must be done upon service of the warrant of arrest.⁷

Agency regulations provide that at any time subsequent to the issuance of warrant of arrest and prior to the commencement of the hearing, alien may apply for voluntary departure (8 C.F.R. 11).⁸

There can be no question of the right to effective counsel at all stages of the immigration proceedings. The rudimentary demands of justice cannot be circumvented by allowing counsel at a hearing, but intimidating the use of counsel by denying discretionary relief merely because appellant followed advice of counsel not to talk or sign anything when he was arrested at his place of employment.

It is a travesty on common sense and the elemental principles of justice to place any credence in the "reason" given for denial of the relief, namely, that appellant had given no reason why he could not accept the offer of voluntary departure at the time of his apprehension. There is not an iota of evidence in the record that such was proffered to appellant and that he refused same. The truth and exact fact as shown by the Transcript of the Hearing is that appellant applied for the relief prior to and during the hearing [Tr. of Hearing, p. 6].

⁷See appendix.

⁸See appendix.

The agency decision on page 2, thereof, makes the following statement:

“An alien who once was granted voluntary privilege and who again is found here illegally does not merit a second chance for such departure in the absence of strong extenuating circumstance (I. D. No. 352).”

That is a quote from a decision of the Board of Immigration Appeals in the Matter of M, 4 I & N Decisions, page 626. In that case the Board further pointed out that “. . . We wish to caution that what we say here is not to be taken as an invariable rule, but that in each case the decision ultimately must be predicated upon the merits or demerits of the case” They reversed the special inquiry officer’s decision in that case and granted voluntary departure to the alien involved. In our case the decision of the Board of Immigration Appeals contains the following:

“The remaining matter is whether voluntary departure should be granted to the respondent. He was granted voluntary departure on November 21, 1953 and his last entry occurred about four days later. He has been in the United States for a period of less than five years and former 8 CFR 242.61(f) (2) (now 8 CFR 242.21(a)) specifically provides that no appeal shall lie to this Board, in such cases, from an order of a special inquiry officer denying an application for voluntary departure as a matter of discretion. Hence, *we are not in a position to grant voluntary departure on appeal even if we were inclined to do so.*” (Emphasis supplied.) (Board of Immigration Appeals Decision, pp. 1, 2.)

To attempt to force an alien to act without advice of counsel is like forcing one charged with an offense to trial before counsel can adequately prepare the case. (*Cf. White v. Regan*, 324 U. S. 760.)

The relationship of attorney and client is one of trust and confidence. Fidelity to a client requires that the attorney should protect and maintain client's just rights. Appellant's counsel was present at his place of employment when the immigration officers came in and asked for him by name. It does not appear in the record but that was when counsel advised appellant not to sign anything or talk until he could see him. That is what the appellant did. He then followed the law by making request prior to and during the hearing for the discretionary relief.

While the Congress imposed in the Attorney General the discretion to grant or deny the relief, and the Attorney General then, by his regulations, permitted a subordinate to make such determination for him without right of appeal, the salient factor is posed for consideration: can one subordinate offer voluntary departure, and another subordinate deny same when there are no change of circumstances, save and except the exercise of the fundamental right to counsel. Appellant says no.

As is so pungently expressed in *Boyd v. United States*, 116 U. S. 616, 636, "Under our system of government there should be no way to subject the life and freedom of one individual to the 'unfettered' or, more particularly, the 'arbitrary power of another.' "

POINT II.

Appellant Concedes That a Denial of a Fair Hearing Cannot Be Established by Proving Agency Decision Wrong.

Appellant Concedes That Trial Court Will Not Substitute Its Judgment of Record for That of Agency. We Acknowledge That Mere Error in Agency Decision Is Insufficient for Legal Relief.

Appellant Strongly Urges That Trial Court's Findings, Conclusion and Judgment Are in Error Because They Are Unsupported by the Record of the Agency Which Appellant Forcefully Contends Show an Arbitrary Abuse of Power and a Denial of Constitutional, Congressional and Agency Regulations Rights of Alien Appellant.

Appellant recognizes, accepts and concedes that the law is well established that a denial of a fair hearing cannot be established by proving that agency decision was wrong or that a court will substitute its judgment in a matter of discretion for that of the agency when Congress has imposed the right of discretion in the agency.

Tisi v. Tod, 264 U. S. 131;

Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, 488;

Taranto v. Hoff, 88 F. 2d 85 (9th Cir.);

United States v. Neely, 202 F. 2d 289.

We recognize that it was the duty of the trial court to make and base his decision on the record made in the administrative proceedings, since there was no trial *de novo*.

Our complain did not ask the trial court to substitute its discretion for that of the administrative

agency. What we did seek, and what the agency record on file in the trial court proved, was a judgment that the special inquiry officer acted arbitrarily and in so doing rendered the hearing unfair, thus voiding the decision of the agency.

As we pointed out, *supra*, the lower court's Finding No. 111 [16] is incorrect insofar as it declares that no appeal was ever taken from said order of departure and said order became final. The true record before the trial court showed that the Board of Immigration Appeals Decision, page 1, says: "This case is before us on appeal from a decision of a special inquiry officer directing the respondent's deportation."

We submit that Conclusion of Law II [16] is improper because the transcript of the hearing shows that the appellant was penalized because he exercised his right to counsel, *supra*.

We submit that Conclusion IV [16] is improper because the transcript of the hearing conclusively shows that the officer based his decision on discretionary relief on matter not of record and upon a denial of right of counsel to act effectively, *supra*.

The Judgment rendered by the lower court is incorrect and should be reversed because it is based upon findings and conclusions not supported by the record.

The Judgment of the lower court is error and should be reversed.

Respectfully submitted,

JOHN P. TOBIN,

Attorney for Appellant.

APPENDIX.

Section 10 of the Administrative Procedure Act of 1946.

(3) "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"(a) Right of Review.—Any person suffering legal wrong because of any agency action are adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action.

"(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitu-

tional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole proceeding or such portions thereof as may be cited by any party, and due accounts shall be taken of the rule of prejudicial error.” 60 Stat. 243, 5 U. S. C. 1009.

Immigration & Naturalization Act of 1952—Section 244(e).

8 U.S.C. 1254(e), 66 Stat. 214.

“ . . .

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraphs (4)-(7), (11), (12), (14), (17) or (18) of Section 1251 (a) of this Title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (4) or (5) of subsection (a) of this section), to

depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this section.”

8 U.S.C.A. 1252(b)(2):

“The alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;—.”

8 C.F.R. 244.11:

“The alien, if he believes that he is eligible for voluntary departure under section 244(e) of the act, may, at any time subsequent to the issuance of a warrant of arrest and prior to the commencement of the hearing, apply therefor. . . .”

8 C.F.R. 244.14(b):

“Upon service of the warrant of arrest, the alien shall be advised of his right to representation by counsel, at no expense to the Government, at the hearing to be held under the warrant of arrest. . . .”

8 C.F.R. 242.53:

“(a) . . .

(b) The special inquiry officer shall conduct a fair and impartial hearing. No decision of deportability shall be valid unless based upon, reasonable, substantial and probative evidence. . . .

(c) Special inquiry officers; specific duties. . . . 5.
present the evidence . . . as to (I) . . . (IV)
factors bearing upon the respondent's eligibility for discretionary relief if application therefor has been made (V). . . .”

8 C.F.R. 242.54:

“(d) Except in the case of an alien who is prima facie deportable under section 242(f) of the act, at any time during the hearing the respondent may apply for suspension of deportation on Form I-256A, for voluntary departure under section 244 of the act, or for both voluntary departure and pre-examination.”

No. 15416
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

VICTOR MANUEL GIL,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director of the Immigration and Naturalization Service at Los Angeles, California,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

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PAUL P. O'BRIEN

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No. 15416

IN THE

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FOR THE NINTH CIRCUIT

VICTOR MANUEL GIL,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director of the Immigration and Naturalization Service at Los Angeles, California,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

Jurisdiction.

The District Court had jurisdiction of the action for declaratory judgment to review a final administrative deportation order of the Immigration and Naturalization Service under the Administrative Procedures Act, 5 U. S. C. 1009, and the Declaratory Judgment Act, 28 U. S. C. 2201.

This Court has jurisdiction of this appeal from the Findings, Conclusions and Judgment of the District Court [T. R. 14] in favor of defendant and against the plaintiff, holding that said deportation order is valid, under the provisions of 28 U. S. C. 1291 and 1294(1), said order being a final decision of the District Court.

Statutes Involved.

Section 241(a)(2) of the Immigration and Nationality Act [8 U. S. C. 1251(a)(2)] reads as follows:

“§1251. *Deportable aliens—General classes*

“(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

“* * *

“(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States.”

Section 244 of the Immigration and Nationality Act [8 U. S. C. 1254(e)] relates to voluntary departure and provides as follows:

“(e) *Voluntary departure*

“The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraphs (4)-(7), (11), (12), (14)-(17), or (18) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (4) or (5) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection. June 27, 1952, c. 477, Title H, ch. 5, §244, 66 Stat. 214.”

The provisions of Section 242.61(f)(2)(ii) of Title 8 of the Code of Federal Regulations provides as follows:

“(f) *Appeals.* * * *

“(2) No appeal shall lie from an order of a special inquiry officer denying an application for voluntary departure or preexamination as a matter of discretion, where: * * *

“(ii) The alien has been in the United States for a period less than five years at the time of the service of the warrant of arrest in deportation proceedings.”

Statement of the Case.

This is an appeal from a decision of the District Court, affirming a final order of deportation by the Immigration and Naturalization Service, of appellant, admittedly an alien, after a judicial review of the administrative file which was offered in evidence as appellee's Exhibit A, which exhibit is transmitted to this Court in its original form and is not contained in the printed record on appeal.

Appellant, admittedly an alien, was on November 21, 1953, granted voluntary departure to Mexico and about four days thereafter, or on about November 25, 1953, he reentered the United States without inspection. [Ex. A, pp. 2, 3.] A warrant of arrest was issued and a special inquiry hearing was held on February 24, 1955, and the decision of the special inquiry officer that the appellant was deportable was affirmed by the Board of Immigration Appeals when it dismissed the appeal from the special inquiry officer's order on February 23, 1956.

As stated in Appellant's Opening Brief (App. Br. 7) the last three lines of Finding of Fact III of the

District Court [T. R. 16] that "No appeal was ever taken from said order of deportation and said order of deportation became final" is erroneous and was included in said Findings by the appellee by mistake.

The fact as above set forth is that an appeal was taken and dismissed by the Board of Immigration Appeals. In any event, the mistaken Finding is immaterial because there is no dispute that the order of deportation which was reviewed by the District Court was a final administrative order of deportation.

In his decision [Ex. A] the special inquiry officer in the exercise of his discretion denied appellant's application for voluntary departure. An analysis of both Points I and II of appellant's brief indicates that the arguments therein contained all relate to that denial of voluntary departure.

Since the grant or denial of voluntary departure is a matter of discretion, the only question which could be raised before the District Court or on this appeal is whether or not there was an abuse of discretion in such denial. This is the question which we treat in our argument.

There is no question with regard to the deportability of appellant, it being admitted in the hearings [Ex. A] and stipulated in the pre-trial order [T. R. 13] that the appellant is a native and citizen of Mexico and that he last entered the United States about November 25, 1953, without inspection.

Summary of Argument.

I.

There was no abuse of discretion in the denial of voluntary departure; the record is clear that appellant illegally re-entered the United States four days after a previous grant of voluntary departure.

ARGUMENT.

There Was No Abuse of Discretion in the Denial of Voluntary Departure; the Record Is Clear That Appellant Illegally Re-entered the United States Four Days After a Previous Grant of Voluntary Departure.

Appellant's arguments under both Points I and II and under his Statement of the Case all seem to relate to the question of denial of voluntary departure by the special inquiry officer. Pursuant to the regulations, *supra*, there was no appeal to the Board of Immigration Appeals on this question. This being a matter of discretionary action, the only question in the District Court and here is whether or not there was an abuse of discretion in the denial of voluntary departure.

Appellant's argument seems to be that there is nothing in the record to sustain the reason given by the special inquiry officer for the denial of voluntary departure, namely, that the appellant had previously been granted voluntary departure and illegally entered the United States four days later. The record clearly supports the reason and statement of the special inquiry officer whose decision, in that portion discussing the application for voluntary departure, reads in part as follows [Ex. A in evidence, page 2 of the Decision of the Special Inquiry Officer]:

"An alien who once was granted voluntary departure privilege and who again is found here illegally does not merit a second chance for such privilege in the absence of strong extenuating circumstances. . . . There are no extenuating circumstances in this case, particularly as the respondent had every opportunity, after having been granted a previous

voluntary departure, to apply for an immigrant visa and lawfully enter the United States if he wished to do so. And further, the respondent has shown no reason why he could not have accepted the privilege of voluntary departure offered him at the time of his apprehension. Voluntary departure privilege is solely a matter of discretion and no alien can claim that privilege as a matter of right. Considering all the factors in this case, it is found that the respondent has resided in the United States for less than five years, that he has previously been granted the voluntary departure privilege in lieu of deportation, that there are no strong extenuating circumstances as to why he should be granted the voluntary departure privilege another time and, on the basis of the entire record, his application in the present proceedings for voluntary departure in lieu of deportation will be denied as a matter of administrative discretion."

At the hearing on February 24, 1955, at pages 2 and 3, are contained the following questions and answers given by the appellant, who admits his prior voluntary departure and subsequent illegal reentry:

"Q. When did you last enter the United States?

A. On 1953 or 1954 in November.

Q. Well, have you been here more than a year.

A. More.

Q. It must have been November 1953, is that right? A. Yes, I believe so.

Q. About what date of the month did you enter?

A. Around the middle of the month.

* * * * *

Q. When did you first enter the United States?

A. It was in October 1953, I don't remember the first part of the month it was.

Q. How did you accomplish that entry? A. I came in near San Ysidro, also.

Q. How many times have you entered the United States? A. Only two.

* * * * *

Q. Well what caused your departure after your first entry? A. I was apprehended by the detective here on Broadway in San Diego.

Q. Were you picked up by the Immigration and sent out? A. I was brought to the Immigration by the detective.

Q. And what did the Immigration do with you? A. I was sent to Mexico.

Q. How long were you detained? A. I was taken to San Pedro for one or two days.

Q. Were you deported from the U. S. or were you granted voluntary departure privilege? A. Voluntary departure.

Q. On what date were you granted that voluntary departure privilege? A. It was on the 21st of November, 1953."

Appellant next argues that voluntary departure was denied for reasons not indicated on the record, and that at one point in the proceedings it was indicated that appellant would be granted voluntary departure and this was later withdrawn.

While it is not conceded that appellant's contentions with regard to matters outside the record are true, nevertheless such arguments are not persuasive because it is clearly

not an abuse of discretion to deny voluntary departure to an alien who has once abused that privilege by illegally re-entering after such a grant. Based on that reason alone the denial would be proper.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Assistant U. S. Attorney,
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No. 15416.

IN THE

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VICTOR MANUEL GIL,

Appellant,

vs.

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Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Reply to Appellee's Argument.

Appellee's brief, page 7, contains the following:

"Appellant next argues that voluntary departure was denied for reasons not indicated on the record, and that at one point on the proceedings it was indicated that appellant would be granted voluntary departure and this was later withdrawn."

Appellant directs this Honorable Court's attention to page 2 of the decision of Special Inquiry Officer where it states:

"At the time of his last apprehension he refused to make a statement or sign any papers on the advice of counsel. *He was also offered the voluntary departure privilege at that time and refused it.*" (Emphasis supplied.)

The transcript of the hearing, page 5, shows that appellant answered that the reason he refused to make a statement at *that time* was:

“I had been advised by my attorney not to sign or say anything *until I saw him.*” (Emphasis added.)

As appellant pointed out in his opening brief, page 13, the question is can one subordinate of the Attorney General offer the discretionary privilege and another refuse it when there is no change of circumstance, save and except the exercise of the right of counsel. Appellee ducks the issue.

The Judgment of the trial court is erroneous and should be reversed.

Respectfully submitted,

JOHN P. TOBIN,

Attorney for Appellant.

No. 15,416

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR MANUEL GIL,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director of the Immigration and Naturalization Service at Los Angeles, California,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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No. 15,416

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR MANUEL GIL,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director of the Immigration and Naturalization Service at Los Angeles, California,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the United States Circuit Court of Appeals for the Ninth Circuit and to the Honorable Dal M. Lemon, Stanley M. Barnes and Frederick G. Hamley, Circuit Judges:

Victor Manuel Gil, appellant in the above described appeal, respectfully petitions the court for a rehearing after decision rendered June 17, 1957.

The original hearing in this matter was had on June 3, 1957, with decision as above.

Summary Statement of Grounds Upon Which a Rehearing Is Requested.

I.

A court in reviewing a decision of an administrative agency must take the decision in full as it is written. The appellant respectfully submits that this Honorable Court erred in determining that concededly improper critical words were not prejudicial and may be disregarded as surplusage. The uncertain effect of incompetent matter which renders harm and violates substantial rights (assumption of matter not of record) makes the hearing unfair.

Bridges v. Wixon, 144 F. 2d 927 (9th Cir.), 326 U. S. 135;

Eagles v. Samuels, 329 U. S. 304;

Bilokumsky v. Tod, 263 U. S. 49.

II.

The regulations which govern deportation hearings and proceedings are the due process of law guarantees of the United States Constitution. There is no due process or compliance with 8 C. F. R. 151.3 which defines the record as the testimony and exhibits and other papers and requests filed in the proceedings. Attention is directed to the fact that said regulation does not grant consideration to something outside the record as was done here. 8 C. F. R. 151.5(a) states that the decision shall set forth a summary of the evidence adduced. This can only mean what it says. The failure to follow the regulations, as was done here, results in an unfair hearing.

United States v. Perkins, 79 F. 2d 533, 534;

Moh See v. White, 242 Fed. 868, 871 (C. C. A. 9);

Sibray v. United States, 282 Fed. 795.

III.

This Honorable Court can only judge the hearing by what the officer did. Not by what he might have done, been justified in doing or EXCUSED from having done.

S. E. C. v. Chevers, 318 U. S. 80, 87, 93-94.

IV.

Appellant at page 13 of his opening brief posed the question that is very material to a correct decision in this matter and which appellant respectfully submits this Honorable Court failed to answer. The question was: CAN ONE SUBORDINATE OFFER VOLUNTARY DEPARTURE, AND ANOTHER SUBORDINATE DENY SAME WHEN THERE ARE NO CHANGE OF CIRCUMSTANCES, SAVE AND EXCEPT THE EXERCISE OF THE FUNDAMENTAL RIGHT TO COUNSEL?

Appellant respectfully submits that this Honorable Court erred in failing to rule thereon and in further failing to rule on whether the so-called additional reason was inappropriate. Appellant urges that it is mandatory to consider the entire agency decision in determining the issue. The entire force that the Attorney General delegates to act for him in granting or denying the discretionary relief is presumed to know and be familiar with *Matter of M*, 4 I & N Dec. 626. It was not special knowledge restricted to the inquiry officer. If the present decision is permitted to stand, there will be no manner in determining when there is fairness.

Conclusion.

Appellant respectfully submits that it is imperative that the entire agency decision, without chopping off deleterious acts as surplusage, as was done by this Honorable Court, must be the basis for due process.

A fundamental and efficacious question of propriety of delegation of power by the Attorney General is at stake as well as the orderly and fair exercise of the right to voluntary departure for an alien.

Only a granting of a rehearing and the reversal of the decision of June 17, 1957, can undo the injustice done appellant.

Dated at Los Angeles this 12th day of July, 1957.

JOHN P. TOBIN,
Attorney for Appellant.

Certificate of Counsel.

I hereby certify that I am counsel for the appellant in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law and in fact, as well, and that said petition is presented in good faith and is not interposed for delay.

Dated at Los Angeles this 12th day of July, 1957.

JOHN P. TOBIN,
Attorney for Appellant.

In the
United States Court of Appeals
For the Ninth Circuit

No. 15417

WALDEMAR J. GEREND,
Petitioner,
vs.

RAILROAD RETIREMENT BOARD,
Respondent.

ON PETITION TO REVIEW DECISION OF RESPONDENT RAILROAD
RETIREMENT BOARD.

BRIEF OF RESPONDENT.

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In the
United States Court of Appeals
For the Ninth Circuit

No. 15417.

WALDEMAR J. GEREND,
Petitioner,
vs.

RAILROAD RETIREMENT BOARD,
Respondent.

ON PETITION TO REVIEW DECISION OF RESPONDENT RAILROAD
RETIREMENT BOARD.

BRIEF OF RESPONDENT.

JURISDICTIONAL STATEMENT.

This proceeding is for review of a decision (R. 1-16) made under the Railroad Retirement Act (50 Stat. 307, as amended; 45 U. S. C. 1952 ed., §§ 228a-228y) by the Railroad Retirement Board, an independent agency in the executive branch of the United States Government, charged with the administration of that Act (section 10; 45 U. S. C. 1952 ed., § 228j).

The decision of the Railroad Retirement Board is subject to review by this Court under section 11 of the Act (45

U. S. C. 1952 ed., § 228k) which incorporates by reference the provisions pertaining to judicial review set forth in section 5(f) of the Railroad Unemployment Insurance Act (52 Stat. 1100, as amended by 60 Stat. 738; 45 U. S. C. 1952 ed., § 355(f)), an Act also administered by the Railroad Retirement Board.

STATEMENT OF THE CASE.

Mr. Gerend, the petitioner herein, asserts that the annuity of \$123.76 awarded him by the Railroad Retirement Board is smaller in amount than he is entitled to under the provisions of the Railroad Retirement Act, principally because the Board did not, in computing his "years of service", credit him with certain months (from "midyear" 1932 through May 1938) during which he claims he performed service for the Southern Pacific Company. The Board found in its decision that Mr. Gerend was not in the compensated service of the Company during this period and that he was not, therefore, entitled to credit for this period in the computation of the annuity.

Annuities to retired employees are computed under the Railroad Retirement Act by multiplying the individual's "years of service" by certain stated percentages of his "monthly compensation" for such service (section 3(a); 45 U. S. C. 1952 ed., Supp. III, § 228c(a)).

"Years of service" is specifically defined as "the number of years an individual as an employee shall have rendered service to one or more employers for compensation or received remuneration for time lost * * *" (section 1(f); 45 U. S. C. 1952 ed., § 228a(f)). (Railroad companies generally are employers under the Act and the Southern Pacific Company is such an "employer".) An individual's "years of service" includes all his service after 1936 (referred to as "subsequent service") and, if that is less than

30 years, and if the individual, like Mr. Gerend, was "an employee" on August 29, 1935,¹ the "enactment date" of the Railroad Retirement Act, the "years of service" include also his service before 1937 (referred to as "prior service") (section 3(b); 45 U. S. C. 1952 ed., Supp. III, § 228e(b)). If "prior service" is included, the total "years of service" that may be credited is 30 (*id.*). Where only part of his service before 1937 is included, it must be taken in reverse chronological order beginning with the last calendar month of such service (*id.*).

"Monthly compensation" is defined as:

"* * * the average compensation paid to an employee with respect to calendar months included in his 'years of service', except (1) that with respect to service prior to January 1, 1937, the monthly compensation shall be the average compensation paid to an employee with respect to calendar months included in his years of service in the years 1924-1931 * * * *Provided, however,* that where service in the period 1924-1931 * * * is, in the judgment of the Board, insufficient to constitute a fair and equitable basis for determining the amount of compensation paid or attributable as paid to him in each month of service before 1937 * * * the Board shall determine the amount of such compensation for each such month in such manner as in its judgment shall be fair and equitable." Section 3(c); 45 U. S. C. 1952 ed., Supp. III, § 228e(c).

1. The Board was able to consider petitioner as an "employee" on this date, even though it found that he was not in the compensated service of the Southern Pacific at that time, because of a specific provision in the Act (section 1(d); 45 U. S. C. 1952 ed., § 228a(d)) under which an individual is considered as having had an "employment relation" on that particular date (and, hence, entitled as an "employee" to credit for "prior service") by reason of six months compensated service to any "employer" (not necessarily the individual's last employer before the enactment date) in the period between the enactment date and 1946. See the further discussion of this point in respondent's reply to petitioner's Point 1-B, *post*, page . . .

(It may be noted, by way of explanation, that service before 1937 was treated differently from subsequent service for purposes of the calculation of the average monthly compensation and number of years of service allowable, because it was in the year 1937 that the present railroad retirement system was set up by Act of Congress and taxes for the support of the system first began to be collected, payable only with respect to service after 1936 (50 Stat. 435, 437, (Cod. of Internal Revenue Laws, (1938) §§ 1500-1536.)

Very briefly, the present case arises out of the following circumstances of Mr. Gerend's career:

In September 1926 Mr. Gerend, then a general clerk and secretary earning \$265 a month (R. 58) in the executive department of the Southern Pacific Company, where he had been employed for many years, stopped working altogether for that Company and began a long employment under Mr. Paul Shoup (R. 76-77, 91-93). Mr. Shoup at that time was Executive Vice President of the Southern Pacific Company, but, in employing Mr. Gerend, it was clearly understood he was not doing so as an officer of the Southern Pacific (R. 171,172). Mr. Gerend was made secretary and manager of an association or company newly organized by Mr. Shoup for the purpose of providing a stock investment vehicle for officers (and, perhaps, later for employees) of the Southern Pacific Company (R. 76-77, 91-93, 172).

This newly organized company appears to have been known as the Railroad Securities Company. There is no evidence or indication in the record that this company was in any sense a subsidiary of Southern Pacific Company, although the principal stock that was to be purchased, at least according to the original plan (R. 172), was Southern Pacific stock. Mr. Shoup was Executive Vice President of the Southern Pacific Company in 1926 (he became President in 1929) but according to petitioner, Mr. Sproule,

the then President, and the directors of the Southern Pacific were opposed to and would not allow that Company's participation in the stock purchasing enterprise (R. 172).

Mr. Gerend was employed in the affairs of this Securities Company until its dissolution, which he says took place as of December 31, 1936 (R. 126). Along with this work Mr. Gerend "from the beginning" took "care of all personal business matters" of Mr. Shoup on the West Coast (R. 92) which apparently were considerable and involved among other things a company wholly owned by Mr. Shoup called the Los Altos Company (R. 85), the activities of which are not shown in the record. This arrangement, according to Mr. Shoup, in a letter (R. 91-93; Appdx. 33) written by him in June 1938 in New York to Mr. A. D. McDonald, the President of the Southern Pacific, served the purpose of minimizing the expenses of the stock purchasing organization and at the same time "fitted well into my own affairs" (R. 92). All of Mr. Gerend's employment through these years was on "matters referred to him by Mr. Shoup" (R. 86). Mr. Gerend admittedly performed no service at all for the Southern Pacific for over five years after September 1926 (R. 84) and no further service by him to the Southern Pacific was contemplated (Pet. Br. 20) when he stopped working for that Company (except for the possibility that he might want to return to the full time employment of the Company at some future time). He was nevertheless continued throughout this time on the payroll of the Company at the rate of \$25 a month (reduced to \$22.50 for some nine months after 1931 according to petitioner's statement in his brief (Pet. Br. 12)), and this monthly payment was made to him until June 1, 1938 (R. 79) when Mr. Shoup retired (R. 77). (When at that time, because of Mr. Shoup's retirement, it was no longer possible for him to have Mr. Gerend kept on the Company payroll, Mr. Shoup increased the monthly salary that he paid

Mr. Gerend by that amount (R. 90).) Mr. Shoup stated in the letter of June 1938, referred to above, that the understanding had been that "this (the monthly \$25 payment to Mr. Gerend) was the company's contribution to the enterprise" (R. 92). In this letter Mr. Shoup also stated that the purpose of keeping Mr. Gerend on the payroll was to preserve his free railroad transportation privileges, "possible pension if he returned to service, and so on" (R. 91). (Mr. Gerend mentions also as reasons for this arrangement, "continuance of hospital membership" and "continuance of group insurance" (R. 86; and Pet. Br. 20)). That there was some thought that Mr. Gerend might return to the Company's employment if the stock purchasing organization did not succeed is further indicated by Mr. Shoup's statement that the "venture was more or less experimental" (R. 91).

Mr. Gerend asserted before the Board that from midyear 1932, when Mr. Shoup was appointed Vice Chairman of the Southern Pacific Company with headquarters at New York, until June, 1938, when Mr. Shoup retired from the Company's service, he, Mr. Gerend, performed certain small tasks for Mr. Shoup which involved Southern Pacific business or affairs (R. 84). In his brief here he further asserts that he and Mr. Shoup agreed in 1932 that thereafter the \$25 a month payment was to be considered as compensation for these tasks (Pet. Br. 21).

SUMMARY OF ARGUMENT.

Congress has provided that in the absence of fraud, findings of the Railroad Retirement Board in cases of this kind are conclusive, and are to be disturbed on review by the courts only if not supported by evidence.

The evidence of record strongly supports the Board's finding, which the petitioner questions, that petitioner did not perform services for the Southern Pacific Company as an employee in any part of the period from September 1926 through May 1938, and that the \$25.00 a month that he received from the Company during this whole period was not intended as, and was not remuneration for, any service he may have performed. By petitioner's own admission the payment was not so intended when it was first begun and he admits also that it was not so intended for more than five years thereafter and that during this period he performed no services for the Company to which it could conceivably be related.

His claim that after mid-year 1932 he did perform some compensated services for the Company as an employee (he himself describes them as being of a "nominal" character), and is entitled to credit therefor in the computation of his annuity, is supported only by his own contradictory testimony and by the statement by one other employee made for the purpose of aiding the petitioner's claim. On the other hand, the Board had before it the report of an official of the Company that its records do not show that petitioner performed any service for the Company during the period in question, and a letter written in 1938, long before petitioner filed his application for an annuity, by Mr. Shoup, the Company official under whom petitioner alleges that he performed the claimed services, which letter strongly indicates that throughout the period in question petitioner was exclusively engaged in work for

Mr. Shoup personally, or in business enterprises of Mr. Shoup having nothing to do with Southern Pacific business. Mr. Shoup's letter showed that the payment of \$25.00 a month to the petitioner by the Southern Pacific was the Southern Pacific's "contribution" to the enterprise in which he personally engaged and, to preserve his pass privileges, and, if he returned to the Southern Pacific's service, to preserve his pension rights.

Most of the "points", numbered 1-A to 1-E, respectively, under which petitioner's arguments are made in his brief are meaningless or irrelevant in the light of what was done in the handling of this case by the Board, and in the light of the plain provisions of the law. Thus, his point 1-A that "undue prejudice" was exhibited against him by the Board's Bureau of Retirement Claims in refusing his "proffer" that the period from September 1926 to December 31, 1931 be excluded from the 1924-1931 "test-period", used in determining his average monthly compensation for all months prior to 1937, is meaningless and without point since that period was omitted by the Board in computing his annuity. Petitioner's annuity has been computed in this way ever since he revealed, following the initial decision by the Board's Bureau of Retirement Claims, that he had not performed any service for the Company during this period.

Again, petitioner's point 1-B, that the Board erred in that it did not find petitioner to be in the "employment relation" on the enactment date under the definition of that term contained in the Act before its amendment in 1946, is meaningless since the Board did find that under the amended definition he was in the "employment relation" on the enactment date and, therefore, entitled to credit for any otherwise creditable service before 1937. Since the only purpose under the Act of finding that an employee was in the "employment relation" on the enact-

ment date is that in such event his service before 1937 may be credited, and since the Board found that petitioner was in the "employment relation" and thus that his service before 1937 could be credited, his point is without purpose.

Again, petitioner argues in his point 1-E that his annuity would have been larger in amount had the Board credited him with \$160.00 a month for his ten months of military service in World War I, as provided in section 4 of the Act. The record shows, however, that the Board credited petitioner with average monthly compensation for all months before 1937 far in excess of \$160.00 a month, so that the only result of including the \$160.00 credit in the computation would have been to reduce his average monthly compensation and so, his annuity. Petitioner, it is to be noted, was given credit for all ten months of his military service for purposes of his "years of service" (the other factor in determining the amount of an individual's annuity).

Similarly, in his point 1-F he argues the correctness of the Appeals Council discussion of the import of Mr. Shoup's letter of 1938, overlooking the fact that the Appeals Council is an intermediate appeals unit within the Board, that he appealed from its decision to the Board itself, and that the decision of the Board obviously superseded the decision of the Appeals Council.

Petitioner's argument (point 1-C) that section 8 of the Railroad Retirement Act does not, because of the lapse of time, permit the Board to find that he did not perform compensated service for the Company where the Board's records show that the compensation was reported by the Company to the Board more than four years ago, ignores the explicit wording and plain intent of section 8 which shows that it applies only with respect to compensation

“paid to an employee” and does not apply to or bind the Board at all.

Petitioner's point 1-D, that the Board and its employees denied him a fair hearing on his claim is not true. He was given an opportunity for an oral hearing and did not accept it. He never indicated he desired to cross-examine anybody. He did not complain until now that the Board obtained and considered a statement from the Company as to what petitioner's record at the Company contained, or that it should have been shown to him. There is nothing whatsoever to support his assertion that the Board cut short his opportunity to present further evidence. His charge that the Board did not answer some of his questions is largely based on the fact that the Board did not argue with him and did not answer (because answer obviously was not required) some of his rhetorical questions which obviously were in the nature of argument. Finally, his charge that the Board refused to “clarify” his employment record in 1945 (long before he applied for an annuity) ignores the fact that he did not then advise the Board that there was anything unusual about his case that would require such action on its part.

ARGUMENT.

I.

THE BOARD'S DECISION IS TO BE AFFIRMED IF IT IS SUPPORTED BY EVIDENCE AND IS NOT INCORRECT IN LAW.

Section 11 of the Railroad Retirement Act (45 U.S.C. 1952 ed. sec. 228k) which authorizes this action, incorporates the judicial review provisions of section 5(f) of the Railroad Unemployment Insurance Act (52 Stat. 1100, as amended by 60 Stat. 738; 45 U.S.C. 1952 ed. § 355(f)). Thus the specific statutory provision governing judicial review of the decision of the Railroad Retirement Board here complained of, is:

“The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive.”

The Courts have held in accordance with the plain meaning of the quoted provision, that upon judicial review of a decision of the Board on a claim for benefits under the Railroad Retirement Act, the Board's decision is not to be disturbed if it is supported by evidence in the record and not based on an error of law. *Monahan v. Railroad Retirement Board*, 183 F. 2d 366 (C. A. 7, 1950); cert. denied, 340 U. S. 854 (1950); *Wheeler v. Railroad Retirement Board*, 184 F. 2d 173 (C. A. 8, 1950); *Squires v. Railroad Retirement Board*, 161 F. 2d 182 (C. A. 5, 1947); *Lane v. Railroad Retirement Board*, 185 F. 2d 819 (C. A. 6, 1950); *Marr v. Railroad Retirement Board*, 206 F. 2d 47 (C. A. 4, 1953).

II.

THE BOARD'S DECISION THAT THE PERIOD FROM MID-YEAR 1932 UNTIL MAY 1938 WAS NOT TO BE INCLUDED IN PETITIONER'S "YEARS OF SERVICE" IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND IS CORRECT IN LAW.

The Board held that although Mr. Gerend, the petitioner, was on the pay roll of the Southern Pacific for \$25.00 monthly from September 1926 until May 1938 (R. 77), these payments were not for service rendered to the Southern Pacific and that no part of this period was to be included in Mr. Gerend's "years of service" (R. 16).

Mr. Gerend, as stated above, admits the correctness of this finding as respects the earlier years of the period (September 1926 to midyear 1932) that these pay-roll payments were made (Pet. Brief 20, R. 72, 151). He claims, however, that the \$25.00 payments from mid-year 1932 until May 1938 should be regarded as compensation for services rendered to the Southern Pacific and that period included in his "years of service" because, he has asserted, during this period he performed some services for the Southern Pacific which he describes as of a "nominal character", largely consisting of "delivering word from Mr. Shoup to business associates regarding political and legislative matters" (R. 84). And in his brief herein, he further asserts (Pet. Br. 21) that in 1932 he and Mr. Shoup agreed that thereafter the \$25.00 which he had been receiving for other reasons was to be considered as compensation for these tasks.

(This assertion of a new agreement was made in a letter (R. 180-192) which Mr. Gerend wrote to Mr. Sherman Adams (Assistant to the President of the United States) after the Board's decision on his appeal; aside from that

instance, this assertion is made by Mr. Gerend for the first time in his brief before this Court.)

In addition to his own assertions, there is only a statement by Mr. J. W. Ferguson, who was Mr. Shoup's secretary in New York, and a statement of Mr. D. J. McGanney, who is now vice president of the Southern Pacific Company, to support his claim that he did perform any such tasks. Mr. McGanney's statement (R. 205-206) was submitted only after the Board had already rendered its decision in this matter. Mr. McGanney made a statement in general terms, that *a review of Mr. Gerend's file* (without indicating the nature of the material or records in the file) confirmed Mr. Gerend's contentions set forth in a letter by Mr. Gerend to Mr. McGanney, including his claim that he had performed railroad tasks for Mr. Shoup pursuant to their understanding that the \$25.00 would thereafter be considered pay therefor. This statement by Mr. McGanney is directly contrary to the statement made by Mr. H. E. Alsing, Secretary of the Board of Pensions of the Southern Pacific, who reviewed Mr. Gerend's company file in 1954 and stated that *there was nothing in the file* to show that Mr. Gerend performed any work for the railroad (R. 77). Moreover, Mr. McGanney's blanket confirmation of Mr. Gerend's statement is made almost meaningless by his statement in the same letter that "all of these subjects have been quite fully covered and cognizance taken of them in the Railroad Retirement Board's decision which I have also read * * *".

Mr. Ferguson's statement (R. 127-128) is the only corroborative evidence of any value that Mr. Gerend submitted to the Board, corroborative, that is to say, that some small tasks involving Southern Pacific work, which Mr. Gerend described as some errand running and message carrying (R. 84), were done by Mr. Gerend incidental to the other work that he did for Mr. Shoup; Mr. Ferguson

does not corroborate Gerend's claim that there was a new agreement in 1932 that the \$25.00 monthly payments should thereafter be considered pay for these little tasks. The suggestion by Mr. Ferguson and by Mr. Gerend that Mr. Shoup had to rely on Mr. Gerend for these little tasks, because he did not have a staff of his own in San Francisco after he went to New York in 1932, is somewhat incredible in view of the fact that the headquarters of the Southern Pacific Company, with many employees available, have always been in San Francisco. Mr. Gerend seems to explain this by the suggestion (R. 171, 173) that there was some difficulty between Mr. Shoup and the officers of the Southern Pacific Company at San Francisco.

The evidentiary value of Mr. Gerend's own testimony is considerably lessened by the circumstance that he had first claimed credit for "service rendered" to the Southern Pacific for the whole period from September 1926 to December 1936 (R. 21-22). He advanced the information that he performed no service to the Southern Pacific Company during the first five years for the \$25 a month it paid him, only after it was made clear to him that the inclusion of such low earnings in the 1924-1931 "test period" had the effect of reducing the average monthly compensation for all his service before 1937, thus reducing the amount of his annuity to the \$109.68 figure first awarded him by the Board's Bureau of Retirement Claims (R. 61-62). Moreover, even after he renounced credit for the period from October 1926 to mid-year 1932, and admitted that he was not an employee in this earlier period, he did not state, in answer to a specific question put to him by the Board's Appeal Council, as to *why* he was paid \$25 a month from October 1926 through May 1938 (R. 83), that he and Mr. Shoup had agreed in 1932 that the \$25 was thereafter to be considered compensation for those "nom-

inal" tasks which he says he then began performing. His answer was only:

"Primarily as a retainer while on a special full time outside employment assigned by Mr. Shoup—and a gesture to maintain employment relationship which would justify

Issuance of transportation
Continuance of Hospital membership
Continuance of Group Insurance

with the ultimate objective of being returned (or being eligible) to full time Railroad employment" (R. 86).

The records of the company, according to Mr. Alsing, give no indication at all that Mr. Gerend performed any services of whatever nature, "nominal" or otherwise, for the railroad (R. 76-77).

Moreover, the record contains a copy of a letter (R. 91-93; Appdx. 33) dated June 8, 1938 from Mr. Shoup to Mr. McDonald, then President of the Company, in which Mr. Shoup, who was about to retire, explained in detail the arrangement under which Mr. Gerend left his job as general office clerk with the Company in 1926. In this letter Mr. Shoup was requesting the reemployment of Mr. Gerend by the Company and in it he obviously advanced the strongest arguments available to him why the Company should reemploy Mr. Gerend in 1938 upon Mr. Shoup's retirement. If Mr. Gerend had been a part-time employee of the Southern Pacific as he contends, working under the immediate direction of Mr. Shoup, and had his employment with the Company in fact continued through all these years from 1932 to 1938, as he contends, this letter would have given some hint of such fact for such circumstance would surely have entitled Mr. Gerend to some additional consideration from the Company. The fact that this letter does not contain any indication that

Mr. Gerend had worked for Mr. Shoup with respect to Southern Pacific matters during the preceding six years clearly indicated the complete lack of substance in Mr. Gerend's claim that he performed such tasks as a Southern Pacific employee, or his claim that he performed them under an agreement with Mr. Shoup that the \$25 a month payment was to be considered thereafter as remuneration by the Southern Pacific for such services. As a matter of fact, the language used by Mr. Shoup in this letter (reproduced in the Appendix hereto, p. 33) suggests, on the contrary, that there was absolutely no change after midyear 1932 when Mr. Shoup's headquarters were transferred from San Francisco to New York.

Mr. Shoup stated specifically that "after my transfer to New York, the arrangement was continued", indicating rather clearly that there was no change in the purpose for which the monthly payment of \$25 was being made. He went on to state that "the affairs of the stock purchasing enterprise were not wound up until some time prior to June 1938," and that "there was then no immediate opportunity for Mr. Gerend to return on any satisfactory basis to the Southern Pacific service", thus, again indicating he did not understand that Mr. Gerend had returned to the service of the company in 1932. He stated, moreover, that Mr. Gerend had been continued on the payroll at \$25 per month "pending determination of his future work" and that after Mr. Shoup's retirement from service he found no opportunity under which he could recommend Mr. Gerend's continuance on the payroll. Mr. Shoup recommended that Mr. Gerend be treated thereafter as a furloughed employee subject to reemployment and that he be given preferential opportunity to again join the active service of the Company when any suitable vacancy presented itself. The language used throughout Mr. Shoup's letter clearly shows that he never considered

Mr. Gerend to have been in the service of the Southern Pacific Company during the period that he was carried on the payroll at \$25 a month.

Even assuming that Mr. Gerend did perform a few "nominal" tasks, errands and the like, which involved Southern Pacific interests (too confidential for him to reveal to the Board even today (Pet. Br. 8)), the assertion by him in his brief (Br. 21-22) that the \$25.00 monthly payments from the Southern Pacific were compensation for those errands is not supported by evidence aside from Mr. Gerend's own testimony. In other words, there is nothing, aside from Mr. Gerend's own statement (and this allegation was never made during the process of adjudication of his claim, even while on appeal, but was made for the first time in a 13 page letter (R. 180-192) dated May 13, 1956, which Mr. Gerend, after the Board's decision on his appeal, wrote to Mr. Sherman Adams, Presidential Assistant, and which letter was referred by Mr. Adams to the Board) to indicate that the payment of the \$25.00 monthly was for a different reason or reasons after 1932 from the reasons for which Mr. Gerend was put on the pay roll at that figure in 1926.

This fact should be considered in the light, too, of another circumstance. Mr. Shoup was the head of Railroad Securities Company, as well as Chairman of the Southern Pacific. Railroad Securities Company was a stock-holding association or corporation, and the stock held was principally Southern Pacific. If Mr. Gerend performed some "nominal" errands for Mr. Shoup, involving Southern Pacific affairs, as he claims, at the same time that he was employed by Mr. Shoup in Railroad Securities Company affairs, and in personal business affairs of Mr. Shoup, it is certainly unlikely that in the performance of these nominal tasks Mr. Gerend changed employers in any respect, that is, that he did not continue throughout to

work for Mr. Shoup as the head of Railroad Securities Company, or for Mr. Shoup in connection with his personal activities or business. This conclusion fits well, of course, with the circumstance, described by Mr. Gerend himself, that when he left the job he had been performing with the Southern Pacific in 1926 to go to work for Mr. Shoup in the stock-purchasing plan, the then President of the Southern Pacific, William Sproule, "made it a point to declare" that Mr. Gerend was not thereafter to be considered an employee of the Southern Pacific Company but as an employee of Paul Shoup (R. 185).

The Six Points Set Forth and Argued in Petitioner's Brief to Support His Petition Are Either Irrelevant and Immaterial or His Assertions Thereunder Are Not Supported by the Record.

Petitioner's argument is divided into six points, numbered 1-A to 1-F, respectively. These are answered in order as follows:

POINT 1-A.

"Did the Board commit an initial error of undue prejudice with respect to appellant, when it refused his proffer (Transcript, p. 67) of 'Why not skip the 10/1/26 to 12/31/31 period entirely.' "

This is the period during which Mr. Gerend was not, by his own admission (R. 151), an employee of the Southern Pacific and performed no service for it although he was on its payroll at \$25 a month. (This period is now generally referred to by Mr. Gerend as extending to mid-year 1932.)

Actually, neither the Board nor its intermediate appeals unit, the Appeals Council, ever included this period in computing Mr. Gerend's "years of service" and the Board's

communications to him informed him that it was not included on numerous occasions (R. 16, 96-97, 119, 140-145). Yet he has persistently argued that the Board should exclude this period from the "test period" (1924-1931) which is used to determine average monthly compensation for all service before 1937.¹ It is true that the initial award made to Mr. Gerend in October 1953 by the Board's initial adjudicating unit, the Bureau of Retirement Claims, used the whole 1924-1931 test period to determine Mr. Gerend's average monthly compensation before 1937 (R. 65) but this was upon the basis of Mr. Gerend's original "Statement of Compensated Service Rendered Prior to January 1, 1937 to Employers Under The Railroad Retirement Act of 1937" (R. 21) which indicated that he had performed service as an employee of the Southern Pacific during this whole period. Mr. Gerend's excuse is that he "obeyed the letter of the law" in that he "reported all compensation from Railroads subject to the Act, and all payroll periods during such compensation was paid" (R. 168-169). The Board's form on which he made his original claim of service does not ask for statements of remuneration received, however, but, in plain language, statements of service performed (R. 21). Mr. Gerend was quick enough to recognize that he had not performed any service to the Southern Pacific between September 1926 and midyear 1932, when it was made clear to him that the inclusion of this period in his record as a period of service, with credit for only \$25 a month compensation, would have the effect of reducing his annuity sharply by reducing his average monthly compensation.

1. Average monthly earnings before 1937 are, under section 3(c) of the Act (quoted in relevant part above on page 3), deemed to be the same as the average monthly earnings in periods of employment during this "test period", except where employment in the "test period" is, in the judgment of the Board, insufficient to constitute a fair and equitable basis for this purpose.

In the light of these circumstances, the charge of "undue prejudice" in refusing "his proffer" is meaningless.

POINT 1-B.

"Did the Board err when in effect it ruled that appellant qualified to obtain credit for prior to January 1, 1937, service and compensation *only* because he had been qualified by Sec. 1(d)(ii) of the Railroad Retirement Act, and not because he had been in employment relation on August 29, 1935, prior to adoption of amendment to the original Railroad Retirement Act now shown as Sec. (d)(ii) and expressed by the language 'before 1946 in each of six calendar months.' "

This point is as empty and irrelevant as the first. Since the Board allowed Mr. Gerend credit for his "prior service" (service before 1937), it impliedly found that Mr. Gerend was an "employee" on August 29, 1935, "the enactment date" of the Railroad Retirement Act (section 1(j) of the Act; 45 U. S. C. 1952 ed., § 228a (j)) for otherwise it could not have allowed him credit for any of his prior service. Section 3(b) of the Act; 45 U. S. C., 1952 ed., Supp. III, § 228c (b). But the term "employee" is specifically defined in the Act (section 1 (b); 45 U. S. C., 1952 ed., § 228a (b)) to include not only persons "in the service" of a covered employer, but also persons "in the employment relation to one or more employers". This term, "employment relation" (*which is used in the Act only in connection with the crediting of "prior service" and has no other function*), is defined (section 1(d); 45 U. S. C. 1952 ed., § 228a (d)) to include, among others, an individual who was "in the service" of an employer after the enactment date and before January 1946 in each of six calendar months, whether or not consecutive. Thus, it is incontrovertibly plain that Mr. Gerend (who was re-employed by the Southern Pacific in 1942 and continued to work for the Company until 1953) was an "employee" on

August 29, 1935, because of having acquired, through service in six months after that date and before 1946 an "employment relation" status, which could have been acquired by six months service before 1946 for any "employer", not necessarily the former "employer". By having this status, Mr. Gerend, as the Board found, had acquired the right to have "prior service" credited. It was therefore wholly unnecessary, as Mr. Gerend urges should have been done, for the Board to have found Mr. Gerend to have been in the "employment relation" (and thus an "employee on the enactment date" for purposes of crediting his "prior service") under the definition of "employment relation" which was contained in the Act before this term was amended (60 Stat. 722, 725, (section 201); 45 U. S. C., 1952 ed., § 228a (d)) in 1946. Before the amendment of 1946 the Act provided that an individual was in the "employment relation" on the "enactment date" if he was "on furlough, subject to call for service within or outside the United States and ready and willing to serve, or on leave of absence, or absent on account of sickness or disability; all in accordance with the established rules and practices in effect on the employer * * *." 45 U. S. C., 1940 ed., § 228a (d). This provision was wholly superseded as to future awards when the 1946 amendments were enacted. 60 Stat. 722, 742, section 404 (45 U. S. C. 1952 ed., note following § 228a). Hence, it could not possibly have application in Mr. Gerend's case.

But even if it did, if the earlier definition of "employment relation" were not superseded, and, even assuming that under the earlier definition also Mr. Gerend would have been found to have an "employment relation" on the enactment date, it would be of no significance to the issue here, which is solely concerned with the reasonableness of the Board's finding that Mr. Gerend was not "in the service" of the Southern Pacific during any of those years when he was being paid \$25 a month.

POINT 1-C.

“Does the Board have a legal restraint (a statute of limitations) imposed upon it by the Railroad Retirement Act, and in particular by Sec. 8, to alter its records (and order accrual of annuities on basis of such altered records) of tax paid compensation and employment some 20 years after such compensation and employment had been ‘returned’ to the Board.”

Section 8¹ is expressly predicated on the premise that the compensation record is that of an “employee”. If the “Board’s records of compensation so returned” for a period actually pertains to an individual who was not an “employee” during the period, section 8 obviously can have no application. This is especially so since the matters as to which the finality attaches are “the amount of compensation paid to an employee”, or “that no compensation was paid to such employee”.

Moreover, this section clearly says that the Board’s records of an employee’s compensation shall be “conclusive” unless the “error” or the “failure” is “called to the attention of the Board” by the employee or by his employer, within four years. The burden, of finding the “error”

1. Section 8 provides as follows:

“Employers shall file with the Board, in such manner and form and at such times as the Board by rules and regulations may prescribe, returns under oath of compensation of employees, and, if the Board shall so require, shall furnish employees with statements of their compensation as reported to the Board. The Board’s record of the compensation so returned shall be conclusive as to the amount of compensation paid to an employee during each period covered by the return, and the fact that the Board’s records show that no return was made of the compensation claimed to will [sic] have been paid to an employee during a particular period shall be taken as conclusive that no compensation was paid to such employee during that period, unless the error in the amount of compensation returned in the one case, or the failure to make return of the compensation in the other case, is called to the attention of the Board within four years after the last date on which return of the compensation was required to be made.”

or "failure" which would cause diminution of the annuity, and taking prompt action, is obviously not cast on the Board by this language but on the employee, and he (or his employer) must "call the attention of the Board" to it. The quoted language is capable of no other meaning. The section was obviously not intended to impose on the Board the task (far beyond its capabilities unless it were expanded into an organization of a size that Congress certainly never contemplated) of either auditing and checking these returns and making sure of their accuracy, or of accepting them as binding on it after four years and paying substantial benefits on the basis of such reports, even though, as here, the evidence before the Board, at the time the claim for benefits is made, shows that the person with respect to whom the compensation was reported was not in the service of the reporting employer during the period for which the compensation was reported. Section 8, it may be noted additionally, obviously refers only to current reports of compensation paid after the initiation of the railroad retirement system, that is, to compensation for "subsequent service" (after 1936) and not for "prior service" (before 1937), so that even were it applicable otherwise, section 8 could not possibly apply to the greater part of the period here involved, mid-year 1932 to May 1938.

POINT I-D.

"Did the Railroad Retirement Board's handling of appellant's claim constitute the unprejudiced hearing that appellant should be entitled to under the Railroad Retirement Act, and in accordance with the constitutional guarantee of a fair trial, *specifically* did the Board err in denying appellant a timely opportunity to examine or cross examine witnesses on testimony proposed to be used against appellant, and to submit rebuttal testimony and argument *before* a final decision was attempted or so-called 'findings' reached?"

The charge that the Board denied Mr. Gerend a "timely opportunity to examine or cross-examine witnesses" is completely without basis in the record. Mr. Gerend at no time requested or gave any indication whatsoever that he desired to examine or cross-examine anybody or even that he desired an oral hearing. As a matter of fact Mr. Gerend was specifically offered an opportunity for an oral hearing by the Appeals Council; his reply was: "Only if necessary" (R. 126) and he did not bring up the subject thereafter.

His complaint that evidence was used by the Board which he did not have the privilege of examining or commenting on (Pet. Br. 11) refers solely to a letter to the Board by Mr. Alsing, Secretary, Board of Pensions of the Southern Pacific, stating that the Company's personal record on Mr. Gerend did not show that he performed any work for the railroad in the period he was paid \$25 a month from October 1926 to May 1938 (R. 76-77). The Appeals Council's decision of June 11, 1954, (R. 96-97), a copy of which was furnished Mr. Gerend (R. 95) found, on the basis of that letter, that the "Southern Pacific Company has informed the Railroad Retirement Board that there is no record which shows that during the period from October 1926 until May 1938, inclusive, the appellant performed any work for the railroad company." Mr. Gerend had plenty of time since June 1954, and before the Board rendered its decision on his appeal, to protest, but at no time did he question this statement of the Appeals Council as to what his personal record with the Company showed and at no time did he even ask to see the evidence upon which it was based. In view of this circumstance his assertion now that the use of this evidence violated his rights is scarcely worthy of notice. Cf. *Ellers v. Railroad Retirement Board*, 132 F. 2nd. 636, 639 (C. A. 2, 1943); *Marmon v. Railroad Retirement Board*, 218 F. 2d 716, 717 (C. A. 3, 1954).

Moreover, petitioner had every opportunity to submit any evidence that he desired throughout the entire course of handling of his claim by the Board and its subordinate units. Nothing in petitioner's brief (or in the record) supports the general allegation that the Board cut short his opportunity to do so.

He was not, as he asserts (Pet. Br. 9), furnished with a month by month statement of the service and compensation credited to him, as requested in his letters of December 21, 1953 (R. 71) and February 28, 1955 (R. 118), but in response to the later letter he was furnished with an only slightly less detailed statement (R. 119) and it is apparent from the language of this letter that the Director of Retirement Claims who wrote it sincerely believed that he was furnishing information which would satisfy Mr. Gerend's request. (The reason his first request was not answered was, obviously, that with his letter requesting the Bureau of Retirement Claims for the information (R. 71) he sent his appeal from the decision of the Bureau to the Appeals Council (R. 72) which in effect took the matter out of the hands of the Bureau.) Actually, Mr. Gerend even now disputes (Pet. Br. 9) the record of only one month's reported compensation (August 1924), an item which could affect the amount of Mr. Gerend's annuity only infinitesimally.

His complaint (Pet. Br. 9) that the Board failed to explain or define some of the phrases that it used in its decision ("any work", "essential difference") really amounts to nothing more than a complaint that the Board refused to join him in his prolonged argument on the merits of his claim. Thus, his complaint that the Board's General Counsel refused to "enlighten appellant as to the legal points contained in letter of February 24, 1957 * * *" (Pet. Br. 13-15a) refers to an argumentative letter (id.) which he addressed to the General Counsel after he had

filed his petition for review in this court. Although he couched his arguments in the form of questions, his reference to them as a request for enlightenment is pure euphemism.

His charge (Pet. Br. 3) that the Board refused to give him a "lucid and full statement as to its policy" on using less than the whole 1924-1931 "test period", for determining the average monthly compensation applicable with respect to service before 1937 is, as has been pointed out above under his "Point I-A", without any meaning, since it was explained to him that in computing his annuity both the Appeals Council and the Board took into consideration only the months from January, 1924 to September, 1926, when he was paid an average monthly salary of \$232.55, and did not take into consideration at all the months after September, 1926, in the "test period", when he was paid only \$25 a month (R. 10, 119-120). Yet he persists in a meaningless argument (Pet. Br. 4) that the Board has the authority, if it would, upon his request to eliminate periods of low earnings from the "test period", 1924-1931.

Again, he accuses the Board (Pet. Br. 9) of a "refusal to answer queries", citing pages 168 and 171 of the record. The questions to which he refers, appearing in an eight page hand-written letter (R. 168-175) teeming with abuse for the Board and its employees, would be construed by any impartial reader as rhetorical in every sense of the word. Justifying his original claim of service during the entire period from October 1926 until 1938, he argued speciously he had merely "obeyed the letter of the law" and asked: "I wonder what your people feel I should have done?" (R. 168). Asserting that his previous statement, that the services performed by him involving Southern Pacific work in the period from midyear 1932 until 1938 were merely "nominal", was in response to "idiotic cross examination questions" by the Appeals Council, he asked:

“What could any reasonable person expect me to have performed in the way of RR service for \$25 a month, other than that of a wholly nominal character” (R. 171). The failure of the Board to answer these questions, then, is another of the ways in which, in Mr. Gerend’s view, the Board deprived him of his constitutional right to a fair hearing.

Another aspect of Mr. Gerend’s charge that the Board did not properly consider his case involves the refusal of the Bureau of Retirement Claims to comply with Mr. Gerend’s suggestion (it was hardly more than that) in his letter of October 27, 1945, (R. 33) that the “individuals with whom I was associated in those years” (a phrase which was not explained) were reaching “advanced age, so if their corroboration is required, steps in that direction should be taken without unnecessary delay.” Mr. Gerend was informed (R. 34) that since there were over a million and a quarter persons whose claims for prior service had to be adjudicated, the Board was not undertaking at that time the handling of the prior service record of any person under 50 years of age, and since Mr. Gerend had not reached that age, his request could not be complied with at that time. It is important to note here that Mr. Gerend’s letter had given no inkling of any special need for early investigation. His statement that the individuals with whom he was associated were reaching “advanced age” did not in itself indicate the necessity for any immediate investigation outside the Company’s payroll since that payroll would provide presumptive proof of service and compensation in the absence of anything to the contrary.

In all but a relatively small number of cases there is no evidence to the contrary, and the Board therefore relies and acts upon that presumption, for which since 1946 it has specific statutory authority (60 Stat. 738, sec. 2, 45 U. S. C. 1952 ed. § 288a (h)) without making any

special investigation. The Board's Bureau of Retirement Claims did so in this case: as pointed out above, it was only after Mr. Gerend protested the initial award to him, which credited him with thirty years of service, including credit for all the months here in controversy (R. 65-66) that the Board learned that Mr. Gerend had been put on the payroll of the Southern Pacific for reasons having nothing to do with actual service (R. 72, 75-77). In his letter of October 17, 1945 (R. 33), he gave no indication of this or that his case was in any way unusual, a quality thereof which he has repeatedly emphasized in later communications, nor did he indicate, as he later stated (R. 104a), that even at that time he foresaw that the Board would "make trouble" for him.

POINT 1-E.

"Is the Board formula for computing annuities that include World War I service, as favorable to the annuitants as the Railroad Retirement Act contemplates that it should be?"

This is not an issue presented by the facts of the case. Mr. Gerend argues, under this point, that the Board has denied him "some of his benefits under the R. R. Ret. Act terms", because the Board did not credit him with \$160 a month for the 10 months in which he was in military service in 1918-1919. Actually his annuity would be smaller if this were done and that was the reason it was not done.

As explained at the beginning of this brief (pp. 2-3), annuities are computed under the Act by multiplying the individual's "years of service" by certain specified percentages of his "monthly compensation", both of which terms are specifically defined in some detail. The computation of Mr. Gerend's annuity was explained to him in detail in a letter dated March 15, 1955 (R. 119-120).

This letter makes it plain that in computing Mr. Gerend's "monthly compensation" the ten months of his military service and the compensation attributable thereto were not taken into consideration but the ten months were included in figuring his "years of service". Had the ten months of military service been included in figuring his average monthly compensation for months before 1937, attributing to these ten months as compensation \$160.00 per month, as Mr. Gerend contends should have been done, it is obvious that the average monthly compensation of \$232.55 which was actually arrived at, would have been reduced, not increased, for one does not increase a \$232.55 monthly average by adding months of \$160.00 earnings.² And although this consideration was not expressed or in so many words spelled out in the letter of explanation which was sent to Mr. Gerend, it is certainly implicit therein and should have been obvious to Mr. Gerend who last worked for the Southern Pacific as an accountant (R. 127) and who as recently as 1942 contemplated becoming a certified public accountant (Pet. Br. 24).

POINT 1-F.

"Did the Appeals Council correctly, as well as without undue prejudice to appellant, interpret the evidence it had developed, and in particular did it correctly sum up the meaning of Paul Shoup's letter of 1938 (Tr. pp. 91-93) in its decisions 5364 and 5590,

2. The inclusion of the ten months of military service and the compensation attributable with respect thereto in computing his average monthly compensation for months before 1937 would have decreased that average from \$232.55 to \$228.07, would have decreased his average monthly compensation for all service, both "prior service" and "subsequent service", from \$258.73 to \$255.39, and would have decreased the amount of his annuity from \$123.76 to \$122.61. If the credit of \$160.00 a month for military service were included in the computation without first including it in the computation of the average for months before 1937, the average monthly computation for all Mr. Gerend's service would have been reduced, even more, to \$255.07, and his annuity to \$122.69.

and which decisions palpably are the basis for the Board's decisions and findings of April 13, 1956?"

The Appeals Council is an intermediate appeals unit within the Board and its decision was automatically superseded when the Board issued its own decision on Mr. Gerend's appeal from the decision of the Appeals Council. Obviously, therefore, there is no question here as to whether or not the Appeals Council ruled correctly. Moreover, as pointed out above, there is no question before this Court as to whether the Board itself ruled correctly, the only question before this Court being whether there is substantial evidence in the record to support the Board's decision and whether that decision was based upon a correct interpretation of the law.

The Board's argument that its decision was supported by substantial evidence and based upon a correct interpretation of the law is set forth above, preceding this discussion of Mr. Gerend's "points". It is noted here additionally only that Mr. Gerend has included in his brief two documents which are not part of the record before the Board. One of these, a "personal record", apparently made by Mr. Gerend in connection with an application for employment in February 1942 in which he did not indicate that he was employed by the Company from September 1926 to midyear 1932 but did indicate employment after that date, obviously must be considered, if non-record evidence may be considered, in the light of his claim before the Board in 1943 (R. 21-22) that he was in the service of the Company from September 1926 through May 1938, his May 24, 1940 letter to the President of the Company (R. 88), indicating that he did not consider himself to have been in the service of the Company in that period, and all the other evidence in this case.

The other document which he includes in his brief, and which is not part of the record in this case, is a letter by

Mr. Shoup in 1942, stating that from October 1926 to March 1941, Mr. Gerend had been employed by Mr. Shoup "not only as a personal secretary but as a business secretary" and had performed well "all the work that he had to do on my account and on account of Railroad Associates". Mr. Shoup stated that he thought "the Southern Pacific Company is fortunate in getting him *back into its service*". (Emphasis supplied.)

Mr. Gerend's point in including this letter in his brief is obscure since it only appears to support further the position of the Board that Mr. Shoup did not regard Mr. Gerend as having been working for the Southern Pacific from October 1926 to March 1941.

CONCLUSION.

Respondent respectfully submits, for the reasons set forth above, that the Court should enter a decree affirming the decision of the Board.

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Railroad Retirement Board,
Of Counsel.

Chicago, Illinois,
June, 1957.

RESPONDENT'S APPENDIX.

In the
United States Court of Appeals
For the Ninth Circuit

No. 15417.

WALDEMAR J. GEREND,
Petitioner,
vs.

RAILROAD RETIREMENT BOARD,
Respondent.

REVIEW OF DECISION OF RESPONDENT
RAILROAD RETIREMENT BOARD.

(R. 91-93)

Mr. Paul Shoup's Letter of June 8, 1938.

New York, June 8, 1938.

Mr. A. D. McDonald,
President,
San Francisco.

Dear Mr. McDonald:

You will remember that in 1927 and 1928 there was a strong sentiment among officers and employes of corporations that they be permitted to become stockholders, many different plans being made effective. Some of these, as in the case of the Standard Oil, provided for the purchase of stock, the company I believe providing $\frac{1}{3}$ or $\frac{1}{2}$ of the purchase price. In others, as in the case of the Tide Water Associated Oil, option was given the officers and employes to purchase certain amounts of stock at fixed prices below the then market, the company carrying the stock until paid for. There were a great many different plans in effect, nearly all of which I think have been abandoned.

A similar sentiment developed among the officers and employes of the Southern Pacific. The opinion was united in its management that the company should not engage in any purchasing plan involving donation from its own funds. It did agree to make purchase for account of employes, as you know, and carry them under certain regulations; but because of this sentiment an organization was started among the officers of the Pacific Lines to purchase stock—primarily Southern Pacific—as a group operation.

Mr. W. J. Gerend, a general office clerk of experience, integrity and capacity for handling this work, was offered the position of Secretary and Manager of the operations of the fund under the direction of a Board of Directors

and an Executive Committee, with myself as President. It was understood that the venture was more or less experimental, and that Mr. Gerend would be retained on the payroll of the Southern Pacific Company at modest pay, with such privileges as might go with a continuance of employe relationship as related to transportation, possible pension if he returned to the service, and so on.

He was, therefore, during my stay in San Francisco after his appointment on January 1, 1929, carried on the Executive Office payroll as my secretary at \$25 per month. This was the Company's contribution to the enterprise. After my transfer to New York, the arrangement was continued.

The affairs of this organization were wound up something more than a year ago, and all assets finally distributed, the Southern Pacific stock being disposed of as a liquidation dividend, along with the Anglo National Corporation stock; the rest of the dividends I believe being in cash.

There was then no immediate opportunity for Mr. Gerend to return on any satisfactory basis to the Southern Pacific service.

From the beginning, in order to minimize the expense of carrying on the affairs of the organization, and because it fitted well into my own affairs, I arranged to have Mr. Gerend take care of all personal business matters on the Coast for me. He has been continued on the Southern Pacific payroll at \$25 per month pending determination as to his future work.

With my retirement from the service, I have found no opportunity under which I could recommend his continuance on the Southern Pacific roll. This leaves him in the position of depending upon employment I can give him for a livelihood. This, of course, was not at all the outlook

presented at the time he left the railroad service as his main activity to undertake the other work.

Mr. Gerend appreciates that in these difficult times there is probably no opening of a satisfactory nature in the Company's service, but he does want to retain such relationship with the Company as will give him best consideration for such a place whenever opportunity occurs. The circumstances, in my judgment, fully sustain this viewpoint. He is now 42 years of age and, of course, does not wish to be in a position of passing the age limit of 45 without understanding that this will not interfere with his employment by the Company if he should not be placed before that time.

He came to our service as a stenographer immediately after he had finished his service and made good progress in his work. He is industrious, efficient, and has abilities far beyond the limit of his present occupation, or any that he has heretofore had.

In all these circumstances I strongly recommend:

(1) that effective as of June 1st, he be treated as a furloughed employe subject to reemployment; and

(2) that both in the interest of the Company, and as a matter of justice to Mr. Gerend, he be kept in sight and be given preferential opportunity to again join the Company's active service when any vacancy that he might fill presents itself.

I had intended to talk to you personally about Mr. Gerend before you left, but in the multiplicity of affairs failed to do so. But I believe this letter states the case, and will reach you on your return.

And I will appreciate very much indeed any consideration that may be given to Mr. Gerend.

Yours very truly,

Original signed

bcc—Mr. W. F. Bull:

PAUL SHOUP

Mr. Gerend's personal record attached for your files.

(R. 83)

Appeals Council's Letter of May 26, 1954 to Mr. Gerend.

May 26, 1954

Mr. Waldemar J. Gerend
4669 Sequoyah Road
Oakland 5, California

In reply refer to
R.R.B. No. A-547382

Dear Sir:

Reference is made to your recent letters relative to your claim for benefits under the Railroad Retirement Act.

Before the Appeals Council can render a final decision in your case, it will be necessary to have the following additional information relative to the compensation of \$25.00 per month which you received from the Southern Pacific Company during the period from October 1926 to (sic) January 1938.

1. Did you perform service of any nature whatsoever for the Southern Pacific Company during this period? If so, explain, giving dates and types of services rendered.
2. Did you perform any services for Mr. Paul Shoup? If so, explain
 - a. Was the \$25.00 per month intended by Mr. Shoup as remuneration for such services?
 - b. Did Mr. Shoup pay you any compensation other than the money you received from the railroad company's pay roll?
3. What other employment did you have during the period from October 1926 to May 1938?

4. What reason was given by the Southern Pacific Company for dropping you from the pay roll beginning June 1938?
5. Did you protest the withholding of Railroad Retirement Taxing Act contributions during the year 1937 and until May 1938.
6. State exactly how much per month you received from the Southern Pacific Company during the period January 1932 through December 1936, and describe your duties during this specific period.
7. Please explain in full the reasons why, in your opinion, you received \$25.00 per month from the pay roll of the Southern Pacific Company during the period October 1926 through May 1938.

Very truly yours,

HALBERT W. DODD,

Chairman, Appeals Council.

HWD:fcc

(R. 84-86)

Mr. Gerend's Reply to the Preceding Letter.

4669 Sequoyah Road
Oakland 5—May 29/54

Mr. H. W. Dodd, Chairman
Appeals Council, USA Ret Bd
Chicago, Ill.

Dear Sir:

Replying to your May 26 inquiry, reference RRB No. A-547382.

In an effort to clarify my relationship to the SP Co for 10/1/26 to 5/38 period I am enclosing

- (A) Letter sent to me by Paul Shoup on 6/8/38 and the enclosure referred to therein
- (B) Letter sent to me by A D McDonald on 1/19/39
- (C) My letter to Mr. McDonald on 5/24/40 and his reply of 5/27/40

Direct answer to your 7 queries is as follows:

(1)

To the best of my recollection I performed no service for SP Co during the period 10/1/26 to midyear 1932, when Mr. Shoup moved to New York. Thereafter, up to Mr. Shoup's retirement in 1938, I was given SP Co code books and occasionally performed errands for Mr. Shoup, relating to SP Co business, per his wire or letter request. After 1932, when Mr. Shoup was in SF, he visited my office to transact SP Co business. On the whole, however, the SP Co services were of a nominal character & largely consisted of delivering word from Mr. Shoup to business associates regarding political and legislative matters

(2)

I did perform services for Paul Shoup—devoting my entire time to such services. Review of my income tax reports throws the following light on my compensation from *all* sources:

| | | |
|------|---|-----------------|
| 1927 | SP Co | 300.00 |
| | Paul Shoup and his wholly owned Los Altos Co | \$3750 |
| | SP Motor Transport Co—Director Fees | \$ 50 |
| | Total for year | \$4086 |
| 1928 | SP Co | \$ 300.00 |
| | Paul Shoup & Los Altos Co | 3600.00 |
| | Railroad Securities Co | 300.00 |
| | Total | <hr/> \$4200.00 |
| 1929 | Same as 1928 or | \$4200.00 |
| 1930 | SP Co | \$ 300.00 |
| | Paul Shoup, Los Altos Co & RR Sec Co | 4275.00 |
| | Total | <hr/> \$4575.00 |
| 1931 | SP Co | \$ 300.00 |
| | Paul Shoup, Los Altos Co & RR Sec Co | 45.00 |
| | Total | <hr/> \$4800.00 |
| 1932 | SP Co | \$ 270.00 |
| | RR Security Co | 270.00 |
| | Paul Shoup & Los Altos Co | 3570.00 |
| | Total | <hr/> \$4110.00 |
| 1933 | SP Co | \$ 270.00 |
| | RR Sec Co | 270.00 |
| | Paul Shoup & Los Altos Co | 3121.50 |
| | Total | <hr/> \$3661.50 |

| | | |
|------|----------------------------|-----------------|
| 1934 | SP Co | \$ 270.00 |
| | RR Sec Co | 270.00 |
| | Paul Shoup & Los Altos Co | 3334.00 |
| | Total | <hr/> \$3874.00 |
| 1935 | Not broken down | \$4020.00 |
| 1936 | SP Co | \$ 300.00 |
| | RR Sec Co | 3270.00 |
| | Paul Shoup & RR Associates | 3666.49 |
| | Total | <hr/> \$7236.49 |
| 1937 | SP Co | \$ 300.00 |
| | Paul Shoup | 3276.00 |
| | Total | <hr/> \$3576.00 |
| 1938 | SP Co | \$ 125.00 |
| | Paul Shoup | 3355.00 |
| | Total | <hr/> \$3480.00 |

(3)

My employment was solely on matters referred to me by Mr. Shoup

(4)

Abolishing of position

(5)

I did not protest withholding of RR Retirement Taxing Act Contributions from 1/1/37 to 5/38. I felt & still feel that the deduction was proper, but I do not feel services & compensation for period 10/1/26 to midyear 1932 were of a character to be used for computing RR Retirement benefits

(6)

This can be developed from the foregoing

(7)

Primarily as a retainer while on a special full time outside employment assigned by Mr. Shoup—and a gesture to maintain employment & relationship which would justify

Issuance of transportation

Continuance of Hospital membership

Continuance of Group Insurance

with the ultimate objective of being returned (or being eligible) to full time Railroad employment

Yours truly

/s/ W J GEREND

Waldemar J. Gerend

4669 Sequoyah Road

Oakland 5 Calif

